No. 84-320-CFX
Status: GRANTED

Title: National Farmers Union Insurance Companies and Lodge Grass School District No. 27, Petitioners
v.
Crow Tribe of Indians, et al.

Docketed:
August 29, 1984

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Hartman, Rodney T.

Counsel for respondent: Pelcyger, Robert S., Belue, Clarence T.

Entry	Date	Note	Proceedings and Orders
1	Aug 29 1984	G	Petition for writ of certiorari filed.
2	Aug 22 1984		Application for stay filed.
3	Aug 23 1984		Response requested - Due 9/4/84 COB.
4	Aug 23 1984		Temporary stay granted by Rehnquist, J.
5	Aug 28 1984		Response of Crow Tribe of Indians, et al. filed.
6	Aug 29 1984		Reply of Natl. Farmers Ins., et al. filed.
7	Sep 10 1984		Continued stay granted by Rehnquist, J., with memorandum opinion.
9	Sep 14 1984		Order extending time to file response to petition until October 29, 1984.
10	Oct 26 1984		Brief amicus curiae of Glacier County, MT and East Glacier County Water & Sewer filed.
11	Oct 26 1984		Brief of respondents Crow Tribe, et al. in opposition filed.
12	Oct 29 1984		Brief of respondents LeRoy Sage, etc., et al. in opposition filed.
13	Oct 29 1984	G	Motion of respondents LeRoy Sage and Flora Not Afraid for leave to proceed in forma pauperis filed.
14	Oct 27 1984		Brief amicus curiae of Arizona, et al. filed.
15	Oct 31 1984		Brief amicus curiae of Washington filed.
16	Nov 7 1984		DISTRIBUTED. November 21, 1984
17	Nov 9 1984	X	Reply brief of petitioners Natl. Farmers Ins., et al. filed.
18	Nov 26 1984		Motion of respondents LeRoy Sage and Flora Not Afraid for leave to proceed in forma pauperis GRANTED.
19	Nov 26 1984		Petition GRANTED. **********
20	Dec 4 1984	G	Motion of respondents Leroy Sage and Flora Not Afraid for appointment of counsel filed.
21	Dec 10 1984		DISTRIBUTED. Jan. 4, 1985. (Above motion).
22	Jan 7 1985		Motion for appointment of counsel GRANTED and it is ordered that Clarence T. Belue, Esquire, of Hardin, Montana, is appointed to serve as counsel for the respondents Leroy Sage and Flora Not Afraid in this case. Justice White OUT.
23	Jan 4 1985		Record filed.
24	Jan 4 1985		Record filed.
25	Jan 14 1985	G	Motion of Salt River Project Agricultural Improvement and Power District, et al. for leave to file a brief as amici curiae filed.
26	Jan 15 1985		Brief amicus curiae of Montana, et al. filed.
27	Jan 18 1985		Brief of petitioners Natl. Farmers Ins., et al. filed.

No. 84-320-CFX

Entry	Date	Note	Proceedings and Orders
28	Jan 22 1985		Joint appendix filed.
29	Jan 18 1985		Brief amicus curiae of Washington filed.
30	Jan 31 1985	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
31	Feb 4 1985	G	Motion of Montana for leave to participate in oral argument as amicus curiae and for divided argument filed.
32	Feb 15 1985		Brief of respondents Leroy Sage and Flora Not Afraid filed.
33	Feb 19 1985		Motion of Salt River Project Agricultural Improvement and Power District, et al. for leave to file a brief as amici curiae GRANTED. Justice Powell OUT.
34	Feb 19 1985		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Powell OUT.
35	Feb 19 1985		Motion of Montana for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Powell OUT.
36	Feb 19 1985		Lodging received.
37	Feb 21 1985		Brief amicus curiae of United States filed.
39	Feb 27 1985		Order extending time to file brief of respondent on the merits until March 15, 1985.
40	Feb 19 1985		Brief amicus curiae of Salt River Pima-Maricopa Indians, et al. filed.
41	Feb 19 1985		Brief amicus curiae of Assiniboine, et al. filed.
42	Mar 15 1985		SET FOR ARGUMENT. Tuesday, April 16, 1985. (1st case).
43	Mar 18 1985		Brief of respondent Crow Tribe, et al. filed.
44	Mar 22 1985		CIRCULATED.
45	Mar 22 1985	D	Motion of Sac and Fox Tribe of Indians of Oklahoma for leave to file a brief as amicus curiae, out-of-time, filed.
46	Apr 9 1985	X	Reply brief of petitioners Natl. Farmers Ins., et al. filed.
47	Apr 15 1985		Motion of Sac and Fox Tribe of Indians of Oklahoma for leave to file a brief as amicus curiae, out-of-time, DENIED.
48	Apr 11 1985	X	Supplemental brief of petitioners National Farmers Union Insurance, et al. filed.
49	Apr 16 1985		ARGUED.

Office - Supreme Court, U.S.
FILED
AUG 29 1984
ALEXANDER L. STEVAS
CLERK

84-320

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES; and LODGE GRASS SCHOOL DISTRICT NO. 27,
Petitioners,

v.

CROW TRIBE OF INDIANS; LEROY SAGE, a minor; FLORA NOT AFRAID, his guardian; THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; EDDIE ROUNDFACE, GLEN BIRDINGROUND, and IRA LEFT HAND, Judges of the Tribal Court of the Crow Indian Reservation; CROW INDIAN TRIBAL COUNCIL; and DONALD STUART, Chairman of the Crow Indian Tribal Council,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether there is a federal claim for relief against Indian tribal governments that unlawfully assert civil jurisdiction over non-Indians.

2. Whether the Tribal Court of the Crow Indian Reservation has jurisdiction over claims that involve the State of Montana (or its subdivisions), that arise on State-owned land, and that occur in connection with activities that are compelled or encouraged by State and Federal law or policy.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES, TREATIES AND OTHER LAWS INVOLVED	2
STATEMENT OF THE CASE	2
A. The Tribal Court Default Judgment Against Petitioner School District	2
B. The District Court's Ruling That The Crow Tribal Court Exceeded Its Jurisdiction	3
C. The Ninth Circuit's Decision That Petitioners Have No Federal Claim	5
REASONS FOR GRANTING THE WRIT	8
I. THIS CASE PRESENTS IMPORTANT AND FREQUENTLY RECURRING QUESTIONS CONCERNING THE ROLE OF THE FEDERAL COURTS IN REVIEWING INDIAN TRIBAL SOVEREIGNTY	8
A. The Court Of Appeals Decision Marks An Abrupt Departure From The Long History Of Federal Court Review Of The Complex Legal Relationships Between Tribal Governments, The State And Federal Governments, And Non-Indian Citizens	9
B. The Need For Early Guidance By This Court Is Underlined By The Extensive Interface Between Indian And Non-Indian Interests As Well As The Steadily Broadening Jurisdictional Assertions Of Indian Tribal Courts	11
II. THE COURT OF APPEALS MISREADS THIS COURT'S LIMITED DECISION IN *SANTA CLARA PUEBLO* AS ANNOUNCING SWEEPING NEW RESTRICTIONS ON THE TRADITIONAL ROLE OF THE FEDERAL COURTS IN REVIEWING ASSERTIONS OF TRIBAL AUTHORITY	14
CONCLUSION	15
APPENDIX	1a

TABLE OF AUTHORITIES

CASES:	Page
Babbitt Ford, Inc. v. *Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 1707 (1984)	7, 12
Cardin v. *De La Cruz*, 671 F.2d 363 (9th Cir.), *cert. denied*, 103 S. Ct. 293 (1982)	7, 13
Cherokee Nation v. *Georgia*, 26 U.S. (5 Pet.) 1, (1831)	9
Draper v. *U.S.*, 164 U.S. 240 (1896)	9
East Glacier County Water & Sewer District v. *Blackfeet Tribal Court*, Cause No. CV 84-33-GF (D. Mont., Great Falls Div.)	13
Ex parte Crow Dog, 109 U.S. 556 (1883)	9
Merrion v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982)	9
Mescalero Apache Tribe v. *New Mexico*, 677 F.2d 55 (10th Cir. 1982), *aff'd*, 103 S. Ct. 2378 (1983)	11
Montana v. *United States*, 450 U.S. 544 (1981)	*passim*
Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978)	*passim*
R. J. Williams Co. v. *Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3846 (U.S. April 27, 1984) (No. 83-1811)	6
Santa Clara Pueblo v. *Martinez*, 436 U.S. 49 (1978)	*passim*
Swift Transportation, Inc. v. *John*, 546 F. Supp. 1185 (D. Ariz. 1982), *vacated as moot*, 574 F. Supp. 710 (1983)	12
Teamsters Public Employees Union Local No. 594 v. *City of West Point, Nebraska*, 338 F. Supp. 927 (D. Neb. 1972)	6
Trans-Canada Enterprises, Ltd. v. *Muckleshoot Indian Tribe*, 634 F.2d 474 (9th Cir. 1980)	9
UNC Resources, Inc. v. *Benally*, 514 F. Supp. 358 (D.N.M. 1981)	12
UNC Resources, Inc. v. *Benally*, 518 F. Supp. 1046 (D. Ariz. 1981)	12
Washington v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980)	9
Williams v. *Lee*, 358 U.S. 217 (1959)	9

Table of Authorities Continued

Page

STATUTES AND REGULATIONS:

28 United States Code:

§ 1254(1) 2

§ 1331 4

Indian Civil Rights Act of 1968:

25 U.S.C. §§ 1301-41 14

25 U.S.C. § 1302 4

MISCELLANEOUS:

F. Cohen, *Handbook of Federal Indian Law*, 355 (1982) 11

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No.

NATIONAL FARMERS UNION INSURANCE COMPANIES; and LODGE GRASS SCHOOL DISTRICT NO. 27,

Petitioners,

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CROW TRIBE OF INDIANS; LEROY SAGE, a minor; FLORA NOT AFRAID, his guardian; THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; EDDIE ROUNDFACE, GLEN BIRDINGROUND, and IRA LEFT HAND, Judges of the Tribal Court of the Crow Indian Reservation; CROW INDIAN TRIBAL COUNCIL; and DONALD STUART, Chairman of the Crow Indian Tribal Council,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The National Farmers Union Insurance Companies ("National") and Lodge Grass School District No. 27 ("School District") hereby respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the District of Montana is reported at 560 F. Supp. 213 (1983) and is reproduced in pages 14a-27a of Petitioners' Appendix ("Pet. App."). The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 736 F.2d 1320 (1984) and is reproduced at Pet. App. 1a-13a.

JURISDICTION

The judgment of the Court of Appeals was entered July 3, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTES, TREATIES AND OTHER LAWS INVOLVED

The issues in the present case concern principally the retained sovereign powers of dependent Indian Tribes which, as discussed below (pp. 9-10, *infra*), are a matter of federal common law. The District Court, after "[a] thorough search of the relevant literature," found no "congressional legislation or treaties delegating civil jurisdiction over non-Indians to the Crow Tribe." 560 F. Supp. at 216 (Pet. App. 20a).

STATEMENT OF THE CASE

A. The Tribal Court Default Judgment Against Petitioner School District

Petitioner Lodge Grass School District No. 27 is a governmental subdivision of the State of Montana and, *inter alia*, operates the Lodge Grass Elementary School within the Crow Indian Reservation. The property on which the school is located, however, is owned by the State of Montana. The School District is obligated by Federal and State law to provide education to Indian as well as non-Indian children residing on the Reservation. 560 F. Supp. at 215 n.2 (Pet. App. 19a).

On May 27, 1982, respondent Leroy Sage, an Indian student attending the Lodge Grass Elementary School, was injured on school premises by an uninsured third party. The injury consisted of a broken leg and allegedly involved about $3,000 in medical expenses. While the matter was being negotiated with and investigated by

petitioner National, the School District's insurer,[1] Leroy Sage and his guardian, respondent Flora Not Afraid, filed a negligence suit in the Tribal Court of the Crow Indian Reservation.

The summons and complaint in the Crow Tribal Court action were served on September 28, 1982 by Dexter Falls Down, a process server for the Tribal Court, on Wesley Falls Down, a member of the school board that administers the School District.

For unknown reasons, Wesley Falls Down neglected to notify any other school authority, or petitioner National, that the action had been filed. According to the District Court's findings, "[a] default judgment was taken on October 19, 1982, twenty-one days" later, granting $3,000 in medical expenses and $150,000 for "pain and suffering." 560 F. Supp. at 214 (Pet. App. 16a).

Wesley Falls Down served the default judgment on the principal of the Elementary School on or about October 27, 1982. Petitioner National first became aware of the Tribal Court action and default judgment on October 29, 1982 when it received a copy in the mail.

B. The District Court's Ruling That The Crow Tribal Court Exceeded Its Jurisdiction

Petitioners filed an action for injunctive relief in the District Court and, in a memorandum opinion dated Janu-

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[1] Petitioner National, a Utah corporation, had issued a comprehensive general liability policy to the School District. National has denied any liability to the School District with respect to the claim. Nonetheless, National is tendering a good faith defense in this matter pursuant to the insurance agreement.

ary 26, 1983,[2] U.S. District Judge James F. Battin upheld petitioners' contention that the Crow Tribal Court lacked subject matter jurisdiction over the tort claim.[3]

First, the District Court found federal jurisdiction under 28 U.S.C. § 1331 (1982). Emphasizing "the overriding federal interest in determining the extent of tribal sovereignty" and "[t]he necessity of a proper forum wherein the extent of tribal court jurisdiction can be determined," Judge Battin concluded that petitioners' action "places at issue the extent of tribal court civil jurisdiction over non-Indians as developed by the Supreme Court in *Montana* v. *United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981)." 560 F. Supp. at 214-15 (Pet. App. 17a-18a).

Turning to the question of the Crow Tribal Court's jurisdiction over the tort claim, Judge Battin, following this Court's analysis in *Montana*, reasoned that such jurisdiction can exist only if (1) it "has been delegated to the Tribe" by statute or treaty, or (2) "the power has been retained by the Tribe as an element of inherent sovereignty even after the Tribal nation became a quasi-

[2] Because respondents Sage and Not Afraid threatened immediate execution of the judgment against school property, petitioners had earlier sought a temporary restraining order, which was granted November 3, 1982. Petitioners also alleged violations of their federal constitutional rights under the Fifth and Fourteenth Amendments and asserted that the procedures followed by the Tribal Court were contrary to the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302 (1982) ("ICRA"). *See* note 4, *infra*.

[3] Petitioners were forced to move quickly in federal court because a writ of execution could have been issued by the Crow Tribal Court as early as November 4, 1982. Moreover, to seek relief from the Tribal Court might have been deemed a waiver of petitioners' objections to the putative personal and subject matter jurisdiction of the Indian tribunal.

sovereign within the exterior boundaries of the United States." 560 F. Supp. at 215-16 (Pet. App. 19a-20a).

Finding no express delegation by statute or treaty, the District Court examined the second test, applying the criteria of *Montana*, 450 U.S. at 565-66. Specifically, Judge Battin concluded that this is not a case involving the Crow Tribe's power to "regulate . . . the activities of non-members who [may] enter consensual relationships with the tribe or its members" (*Montana*, 450 U.S. at 565), stressing that "indeed, the School District is a subdivision of the sovereign government of the State of Montana." 560 F. Supp. at 215-16 (Pet. App. 19a-21a). Nor, according to Judge Battin, does this case involve the Tribe's power to exercise civil authority over "the conduct of non-Indians" that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare *of the Tribe*. *Montana*, at 566" (emphasis in original), because it involves only a "dispute between the school district and the injured schoolboy." 560 F. Supp. at 216 (Pet. App. 21a-22a).[4]

C. The Ninth Circuit's Decision That Petitioners Have No Federal Claim

Respondents appealed Judge Battin's decision and a divided panel of the Ninth Circuit reversed on July 3, 1984. Although respondents did not argue that petitioners lack a federal remedy,[5] the brief majority opinion

[4] Because the Court held "that the Tribal Court did not have jurisdiction over the tort claim," it declined to rule on petitioners' other challenges to the Tribal Court judgment (*see* note 2, *supra*), but specifically reserved them "for resolution at a later date." 560 F. Supp. at 215, n.1 (Pet. App. 18a). Petitioners intend to pursue these issues if appropriate after disposition by this Court.

[5] Respondents' briefs on appeal conceded the existence of a federal cause of action for abuse of tribal court jurisdiction, but argued that

holds that even if the Crow Tribal Court did not have jurisdiction over respondent Sage's tort claim, petitioners have no "claim for federal relief." 736 F.2d at 1323 (Pet. App. 7a).[6]

The basis of the majority's holding is difficult to decipher. First, it concludes that a Ninth Circuit decision in a separate action, *R. J. Williams Co.* v. *Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3846 (U.S. April 27, 1984) (No. 83-1811), "controls this case." 736 F.2d at 1322 (Pet. App. 5a). Nonetheless, as Judge Wright's dissenting opinion points out, the plaintiffs in *R. J. Williams* "did not allege general federal question jurisdiction under federal common law." 736 F.2d. at 1325 (Pet. App. 11a). *See R. J. Williams*, 719 F.2d at 981-83.

Apart from the exigencies of this case (*see* note 9, *infra*) and the fact that petitioners are not required to pursue futile remedies, the imposition of an exhaustion requirement now is plainly inappropriate considering the time and resources that have been invested in resolving this federal court action. *See, e.g., Teamsters Public Employees Union Local No. 594 v. City of West Point, Nebraska*, 338 F. Supp. 927 (D. Neb. 1972).

Second, the majority's analysis appears to be based on an expansive reading of this Court's decision in *Santa*

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petitioners must first exhaust tribal court remedies. *See* Brief of Appellants Leroy Sage and Flora Not Afraid at 4-6; Brief of Appellant Crow Tribe of Indians at 9-12.

[6] Circuit Judge Wright's separate opinion disagrees with this conclusion but concurs in the result because of petitioners' failure to submit themselves to the Crow Tribal Court's jurisdiction to exhaust whatever remedies are available there. 736 F.2d at 1324. (Pet. App. 8a). *See* note 3, *supra* and note 9, *infra*.

Clara Pueblo v. *Martinez*, 436 U.S. 49 (1978) as broadly confirming a "manifest" congressional purpose, supposedly embodied in the Indian Civil Rights Act, "to limit the intrusion of federal courts upon tribal adjudication." 736 F.2d at 1323 (Pet. App. 7a). As Judge Wright's dissenting opinion forcefully points out, however, and the majority grudgingly concedes, the federal courts including this Court have frequently recognized a federal right to relief for abuse of tribal power. 736 F.2d at 1323-1325 (Pet. App. 5a-7a, 8a-11a).

In the end, the Court of Appeals concedes that there "may" be "a federal cause of action" for "a tribe's abuse of *regulatory* jurisdiction," but that in cases (like this one) of "*adjudicatory* jurisdiction," there is no basis for federal court relief. 736 F.2d at 1323 (Pet. App. 6a-7a) (emphasis supplied). Whatever the meaning of this distinction,[7] its unmistakable consequence for petitioners is underscored by Judge Wright's separate opinion: it "makes the tribal court the first *and last* arbiter of its own jurisdiction." 736 F.2d at 1325 (emphasis in original) (Pet. App. 12a).[8]

Petitioners applied to this Court on August 22, 1984 for a stay of the mandate of the Court of Appeals after

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[7] As Judge Wright's dissent points out, many of the cases that apparently fall within the majority's definition of "regulatory jurisdiction" came to the federal courts from Indian tribal courts. 736 F.2d at 1324. (Pet. App. 9a). *See, e.g., Babbitt Ford, Inc.* v. *Navajo Indian Tribe*, 710 F.2d 587, 591 (9th Cir. 1983), *cert. denied* 104 S.Ct. 1707 (1984); *Cardin* v. *De La Cruz*, 671 F.2d 363 (9th Cir.), *cert. denied* 103 S. Ct. 293 (1982).

[8] Although the Court of Appeals maintains that petitioners could raise their jurisdictional challenge to the Tribal Court judgment in defense of collateral enforcement proceedings brought in the Montana courts, *see* 736 F.2d at 1324 n.5 (Pet. App. 7a), there is no prospect that respondents will follow that course.

unsuccessfully seeking relief below. Petitioners' stay application was granted by Associate Justice Rehnquist on August 23, 1984 "pending further order of the undersigned or of this Court."[9]

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS IMPORTANT AND FREQUENTLY RECURRING QUESTIONS CONCERNING THE ROLE OF THE FEDERAL COURTS IN REVIEWING INDIAN TRIBAL SOVEREIGNTY.

The decision of the Court of Appeals holds that, in a potentially large but ill-defined class of disputes, the federal courts are without power to protect non-Indians from abuse of tribal court jurisdiction. As detailed below, the Court of Appeals decision overlooks longstanding federal judicial practice and, in the absence of early guidance by this Court, is likely to produce considerable confusion if not chaos as Indian tribal courts continue to assert and expand jurisdictional claims over non-Indians.

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[9] Petitioners were forced to seek a stay because after the decision by the Court of Appeals, respondents Sage and Not Afraid continued to threaten to execute the Crow Tribal Court default judgment. *See* note 2, *supra*. In fact, school property was seized by Tribal Court officials and was scheduled for sale at public auction. *See* petitioners' Application for Immediate Stay of Execution of Mandate of the United States Court of Appeals for the Ninth Circuit and for Ancillary Relief, No. A-123, dated August 22, 1984.

Judge Wright's separate opinion in the case below relied on cases which are unrelated to the jurisdictional disputes at issue here. Moreover, Judge Wright made no attempt to apply the "flexible" exhaustion test of that line of cases to the exigencies presented in this case. *See also* note 6, *supra*.

A. The Court Of Appeals Decision Marks An Abrupt Departure From The Long History Of Federal Court Review Of The Complex Legal Relationships Between Tribal Governments, The State And Federal Governments, And Non-Indian Citizens.

Since early in the history of the Nation, the federal courts including this Court have labored at the task of reconciling the complicated inter-relationships between Indian Tribal Governments, the State and Federal Governments, and citizens—both Indians and non-Indians—that are affected by inter-governmental conflicts of jurisdiction. *See, e.g., Cherokee Nation* v. *Georgia*, 30 U.S. 1 (5 Pet. 1) (1831) (exploring the retained sovereignty of Indian tribes after submitting to the authority of the United States); *Ex parte Crow Dog*, 109 U.S. 556 (1883) (determination of criminal jurisdiction over crimes committed by one Indian against another is exclusive in the tribe absent federal law to the contrary). While Federal Indian law jurisprudence encompasses a wide variety of subjects such as taxation, business licensing and civil and criminal authority,[10] the principles announced in the decisions are derived primarily from a reasonably well-defined body of federal law, including especially treaties and federal statutes, as well as from principles of construction applied by federal courts. *See,*

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[10] *See, e.g., Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (relating to a state requirement that Indians collect state cigarette tax); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (addressing ability of Indian tribes to impose severance taxes on non-Indians); *Trans-Canada Enterprises, Ltd.* v. *Muckleshoot Indian Tribe*, 634 F.2d 474 (9th Cir. 1980) (business licensing); *Williams* v. *Lee*, 358 U.S. 217 (1959) (civil jurisdiction over Indian defendants is exclusive in tribal courts); *Draper* v. *U.S.*, 164 U.S. 240 (1896) (federal criminal jurisdiction over murder of a non-Indian by another non-Indian on a reservation).

e.g., *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978).

What has emerged is a substantial body of federal common law on the question of the powers and jurisdictional limitations of Indian tribal governments *vis-a-vis* other governments and citizens. In recent years, this Court and the lower federal courts have increasingly turned attention to the exercise by Indian tribal courts of jurisdiction over non-Indians. In *Oliphant*, for example, this Court held that Indian tribal courts lack criminal jurisdiction over non-members of the Tribe. 435 U.S. at 211-12. The complementary case concerning civil jurisdiction, *Montana*, extended the *Oliphant* rule against tribal court authority over non-Indians except in two specific kinds of circumstances: (1) the regulation of non-members who enter consensual relationships with the Tribe, and (2) protection of the political integrity, economic security, or health or welfare of the Tribe. 450 U.S. 564-66. *See* p. 5, *supra*.

Prior to the Court of Appeals decision below, the lower federal courts were in the process of applying the *Montana* criteria, and other federal common law principles of Indian tribal sovereignity, to a broad and growing array of disputes involving claims of abuse of tribal jurisdiction. *See* pp. 11-13, *infra*. The Ninth Circuit's sudden proclamation of a sharply reduced role for the federal courts in resolving tribal court jurisdiction not only goes a long way toward writing *Montana* off the books, but also is likely to create considerable confusion in a wide variety of legal and commercial contexts, as we show in the next section.

B. The Need For Early Guidance By This Court Is Underlined By The Extensive Interface Between Indian And Non-Indian Interests As Well As The Steadily Broadening Jurisdictional Assertions Of Indian Tribal Courts.

Like the Port Madison Reservation discussed in *Oliphant*, Indian reservations are typically "checkerboard[s]" of "tribal community land, allotted Indian lands, property held in fee simple by non-Indians, and various roads and public highways maintained" by county, state and federal governments, as well as "public schools, public utilities and other facilities in which" the tribes have "no ownership or interest." 435 U.S. at 193 & n.1. In addition, a substantial portion of the individuals residing on many reservations are non-Indians.[11] As this Court has observed, much of the "checkerboard" character of Indian reservations—including specifically the Crow Indian Reservation at issue in this case—is the product of previous Federal policies which were not intended to subject non-Indian inhabitants to tribal regulatory authority. *Montana*, 450 U.S. at 559-60 & n.9.

The obvious potential for recurrent disputes over Indian tribal court jurisdiction over non-Indians is amplified by the relatively recent efforts of Tribal Governments to establish tribal courts and to aggressively extend their jurisdiction to non-Indians.[12] Over one hundred tribal

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[11] In the case of the Port Madison Reservation discussed in *Oliphant*, for example, only 50 of about 3,000 inhabitants are members of the Tribe. *Id. See also Mescalero Apache Tribe* v. *New Mexico*, 677 F.2d 55, 57 n.1 (10th Cir. 1982), *aff'd*, 103 S. Ct. 2378 (1983) (contrasting the Mescalero Apache Reservation, where less than 200 acres out of a total of 460,000 are owned by non-Indians, with the Crow Reservation at issue in this case, where 28 percent of the land within the reservation is owned by non-Indians).

[12] Historically, non-Indians have not been subject to civil or criminal suits in Indian courts. *See* F. Cohen, *Handbook of Federal Indian Law*, 355 (1982) ("[i]n the past tribes have not authorized their courts

courts now exist throughout the country,[13] and these tribal courts are increasingly asserting jurisdiction over non-Indian inhabitants on reservations. As already mentioned, these interests include school districts, housing authorities, other governmental services, and public utilities, as well as private individuals and businesses.

The character and magnitude of the potential impact of the Ninth Circuit's decision is perhaps best illustrated by the kinds of cases in which federal courts have, at least heretofore, entertained challenges to Indian tribal court assertions of jurisdiction over non-Indians. These cases include: (1) tort actions seeking recovery of compensatory and punitive damages for spills of uranium mill tailings, *UNC Resources, Inc.* v. *Benally*, 514 F. Supp. 358 (D.N.M. 1981) (suits in Navajo Tribal Court amounting to $30 million—injunctive relief granted), *UNC Resources, Inc.* v. *Benally*, 518 F. Supp. 1046 (D. Ariz. 1981) (companion to previous case—injunctive relief granted); (2) a civil damages action for violation of tribal regulations prescribing procedures for repossession of Indian personal property, *Babbitt Ford, Inc.* v. *Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1707 (1984) (affirming district court's denial of injunctive relief); (3) a tort action against non-Indians for an auto accident on a U.S. highway within the boundaries of the Navajo Reservation, *Swift Transportation, Inc.* v. *John*, 546 F. Supp. 1185 (D. Ariz. 1982), *vacated as moot*, 574 F. Supp. 710 (1983) (injunctive relief granted); (4) an injunc-

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to entertain civil cases against non-Indian defendants. The only forum available for most actions arising in Indian country by Indians against non-Indians has been a state court, and state decisions have sustained this jurisdiction." [citations omitted]); *Oliphant*, *supra* at 195-206 (1978).

[13] *Santa Clara Pueblo*, 436 U.S. at 65 n.21.

tive action against non-Indians operating a store on the Quinault Indian Reservation in violation of tribal health regulations, *Cardin* v. *De La Cruz*, 671 F.2d 363 (9th Cir.), *cert. denied*, 103 S. Ct. 293 (1982) (reversing district court's grant of injunctive relief).

Indeed, the potential legal and commercial ramifications of the Ninth Circuit decision are already being felt. For example, attorneys from both the Montana Office of Public Education and the Montana Attorney General's Office have expressed serious concern about the impact of the Ninth Circuit's decision on the 47 Montana school districts located on Indian reservations, and have indicated an interest in participating in any review proceedings in this Court.[14] Similarly, a Montana public utility district serving the Blackfoot Reservation is threatened with bankruptcy because the Blackfoot Tribal Court has enjoined the district from terminating utility service on the reservation for nonpayment of bills. A federal district court proceeding to review the jurisdiction of the Blackfoot Tribal Court ruling was summarily dismissed in the wake of the Ninth Circuit decision below. *East Glacier County Water & Sewer District* v. *Blackfeet Tribal Court*, Cause No. CV 84-33-GF (D. Mont., Great Falls Div.).

It is readily apparent that the principle set down by the Court of Appeals could have a profound impact on existing legal and commercial relationships between reservation inhabitants and a wide variety of institutions, including public schools, utilities, municipalities, and other public or quasi-public bodies supplying services to Indians and non-Indians alike. Accordingly, this Court should

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[14] *See* Petitioners' Stay Application, note 9, *supra*, at Attachment C.

accept review to clarify the extent to which Indian tribal courts are the sole arbiters of their own jurisdiction.

II. THE COURT OF APPEALS MISREADS THIS COURT'S LIMITED DECISION IN *SANTA CLARA PUEBLO* AS ANNOUNCING SWEEPING NEW RESTRICTIONS ON THE TRADITIONAL ROLE OF THE FEDERAL COURTS IN REVIEWING ASSERTIONS OF TRIBAL AUTHORITY.

Apart from the important and recurring character of the issues presented, this case deserves Supreme Court review because the decision of the Court of Appeals below seriously misinterprets this Court's decision in *Santa Clara Pueblo*.

As already observed, the majority opinion below appears to find in *Santa Clara Pueblo* the foundation for a broad new limitation on the role of the federal courts in protecting non-Indians from abuses of tribal court jurisdiction. But *Santa Clara Pueblo* involved an *intra-tribal* political dispute and, as Mr. Justice Marshall's opinion for the Court makes clear, addressed *only* the question of whether the Indian Civil Rights Act "may be interpreted to impliedly authorize" federal civil actions to enforce the Act's "substantive provisions." 436 U.S. at 51-52. In deciding that no such implied federal cause of action to enforce the ICRA exists, the Court's analysis focused on the purposes and legislative history of the ICRA. *Id.* at 60-72.

In other words, there is no implication in *Santa Clara Pueblo*—much less a comprehensive analysis—that supports withdrawing or limiting federal common law remedies for abuse of jurisdiction by Indian tribal courts. Nonetheless, in light of the potential impact of the Ninth Circuit decision, this Court should accept review to clarify the limited scope of *Santa Clara Pueblo*.

CONCLUSION

This case presents important questions concerning the role of the federal courts in enforcing what this Court has called the Federal Government's "great solicitude that its citizens be protected . . . from unwarranted intrusions on their personal liberty." *Oliphant*, 435 U.S. at 210. The confined role envisioned by the Court of Appeals is inconsistent with a substantial body of federal common law, misreads this Court's decision in *Santa Clara Pueblo*, and may have a broad impact especially in the West.

Accordingly, this Court should grant petitioners' request for a writ of certiorari to review the decision of the Court of Appeals in this case.

Respectfully submitted,

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August 29, 1984

**Counsel of Record*

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 83-3606, 83-3645

NATIONAL FARMERS UNION INSURANCE COMPANIES, a Utah corporation, and Lodge Grass School District No. 27,
Plaintiffs-Apellees,

v.

CROW TRIBE OF INDIANS, *et al.*,
Defendants-Appellants.

Argued and Submitted Dec. 6, 1983,
Decided July 3, 1984

School district and its insurer sought preliminary injunction preventing injured schoolboy from executing on default judgment taken in Indian tribal court against school district. The United States District Court for the District of Montana, James F. Battin, Chief Judge, 560 F.Supp. 213, held that tribal court lacked jurisdiction over the tort claim, that Montana state court had jurisdiction over the controversy, and that school district and its insurer were entitled to the injunctive relief requested. Tribal defendants appealed. The Court of Appeals, Fletcher, Circuit Judge, held that insurer's complaint challenging tribal court's assertion of jurisdiction over insured school district in civil suit brought by injured Indian schoolboy stated no claim for relief under federal common law; tribal court itself was proper forum for

determination, at least in the first instance, of extent of tribal court's jurisdiction.

Reversed.

Eugene A. Wright, Circuit Judge, dissented in part, concurred in result, and filed opinion.

Rodney T. Hartman, Herndon, Harper & Munro, Billings Mont., for plaintiffs-appellees.

Scott McElroy, Thomas R. Acevedo, Fredericks & Pelcyger, Boulder, Colo., for Crow Tribe.

Clarence T. Belue, Hardin, Mont., for Sage and Not Afraid.

Appeal from the United States District Court for the District of Montana.

Before WRIGHT, ANDERSON and FLETCHER, Circuit Judges.

FLETCHER, Circuit Judge:

In May of 1982, Leroy Sage, a minor, and an enrolled member of the Crow Indian Tribe, was struck by a motorcycle while in the parking lot of Lodge Grass School District No. 27. The School District is located on land owned by the State of Montana and within the exterior boundaries of the Crow Indian Reservation. Sage and his guardian, Flora Not Afraid, filed a negligence suit against the school district in Crow Tribal Court. Tribal process was served on the chairman of the school board, but the school district failed to answer Sage's complaint or to appear in tribal court to contest its jurisdiction. Sage ultimately obtained a default judgment against the school district. Upon receiving notice of the default judgment, the school district notified its insurer, National Farmers Union Insurance (National), of the tribal suit. Neither the

school district nor National contested the default judgment in Crow Tribal Court, *see* Crow Tribal R.Civ. Proc. 17, or sought an appeal to the Crow Tribal Court of Appeals, *see* Crow Tribal Code § 31-1-103; Crow Tribal R. App.Proc. 2. Instead, National obtained a temporary restraining order from a federal district court prohibiting Sage from enforcing his default judgment, and filed suit against the Crow Tribe, the Crow Tribal Council, the Crow Tribal Court, tribal judges and the chairman of the tribal council, seeking a permanent injunction.[1] On December 29, 1982, the district court entered a permanent injunction prohibiting Sage, Not Afraid, their counsel, the tribal judges and the chairman of the tribal council from executing on any judgment or pressing any claim against National or the school district arising from Sage's injury. We reverse.

The district court held that it had jurisdiction over the suit under 28 U.S.C. § 1331 (1976),[2] and ruled that National's claim arose under federal common law. *See National Farmers Union Insurance v. Crow-Tribe of Indians*, 560 F.Supp. 213, 214-15 (D.Mont.1983). National's complaint alleged that the tribal court violated the federal constitution and the Indian Civil Rights Act, 25 U.S.C. §§ 1301-41 (1976) (ICRA), by asserting jurisdiction over the school district. The district court declined to decide whether allegations of deprivation of constitutional rights or violations of the Indian Civil Rights Act stated a claim for federal relief. *See* 560 F.Supp. at 215 & n. 1. Instead,

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[1] The parties later stipulated to the joinder of Sage and Not Afraid as additional defendants.

[2] As we noted in *R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979, 981 (9th Cir.1983), a court may take jurisdiction under 28 U.S.C. § 1331 if it must make a determination of law in order to determine whether plaintiff has stated a federal claim.

the court ruled that the allegation that a tribal court had improperly exercised its jurisdiction stated a federal common law claim, because "[t]he necessity of a proper forum wherein the extent of tribal court jurisdiction can be determined can hardly be overemphasized." *Id.* at 215. Proceeding to the merits of National's claim, the court held that the Crow Tribal Court lacked subject matter jurisdiction over Sage's suit and, therefore, entered a permanent injunction.[3]

In *R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979, 981-82 (9th Cir. 1983), decided after the district court's decision in this case, we held that a complaint challenging a tribal court's assertion of jurisdiction over a non-Indian defendant in a civil suit

[3] The district court's analysis of subject matter jurisdiction assumed that the tribe's adjudicatory authority must be coextensive with its regulatory authority. Although our disposition of the case makes it unnecessary to reach the merits of National's jurisdictional argument, we find this assumption untenable. Cases are commonly adjudicated in forums that would lack the authority to regulate the subject matter of the disputes. *See generally Allstate Insurance Company v. Hague*, 449 U.S. 302, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981). In analyzing whether a dispute may be decided in a particular state or federal court, we have inquired only whether the court's exercise of jurisdiction is authorized by applicable forum law and whether it comports with due process. *See, e.g., Keeton v. Hustler Magazine*, ___ U.S. ___, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984). The jurisdictional question is not controlled by whether it would be appropriate to apply the forum's substantive law to the dispute. *See Shaffer v. Heitner*, 433 U.S. 186, 215, 97 S.Ct. 2569, 2585, 53 L.Ed.2d 683 (1977). The tribal character of a challenged forum does not alter the essential nature of this inquiry. "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65, 98 S.Ct. 1670, 1680, 56 L.Ed.2d 106 (1978).

stated no federal claim for relief. We conclude that *R.J. Williams* controls this case. Accordingly we reverse.

DISCUSSION

National's complaint, as amended, alleges that the tribal court's exercise of jurisdiction over its insured deprived it of due process and equal protection. Indian Tribes are not constrained by the provisions of the fourteenth amendment. *See R.J. Williams*, 719 F.2d at 982; *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474, 476-77 (9th Cir. 1980). National's due process and equal protection claims cannot, therefore, arise under the Constitution. *R.J. Williams*, 719 F.2d at 981. Tribes are, however, bound by the provisions of the ICRA. *Id.* The ICRA requires tribal courts to exercise their jurisdiction in a manner consistent with due process and equal protection. 25 U.S.C. § 1302(8). Congress has expressly limited federal court review of a claimed violation of the ICRA to encompass a single remedy: the writ of habeas corpus. 25 U.S.C. § 1303. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 66-70, 98 S.Ct. 1670, 1681-1683, 56 L.Ed.2d 106 (1977); *Boe v. Fort Belknap Indian Community*, 642 F.2d 276, 278 (9th Cir. 1981). A civil suit to enjoin violations of the ICRA is not cognizable in federal court. *Santa Clara Pueblo*, 436 U.S. at 67-70, 98 S.Ct. at 1681-1683; *accord R.J. Williams*, 719 F.2d at 981. Neither the constitution nor the ICRA provides a basis for a federal cause of action.

National urges us, however, to recognize a cause of action arising under federal common law that would permit a civil suit to enjoin the proceedings of a tribal court. National's argument has superficial appeal. It invokes authority holding that a complaint challenging tribal abuse of its civil *regulatory* jurisdiction states a claim arising under federal common law. *See, e.g., Babbitt*

Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587, 591 (9th Cir.1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1707, 80 L.Ed.2d 180 (1984); *Gardin* [sic] *v. De La Cruz*, 671 F.2d 363, 365, *cert. denied*, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982). The Supreme Court relied on principles of federal common law to determine whether a tribal court had exceeded its jurisdiction in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978). The question whether a tribe has abused its adjudicatory jurisdiction seems, at first glance, to be as appropriate as a question involving tribal regulatory jurisdiction for resolution in a suit brought in federal court.

Oliphant v. Suquamish Indian Tribe, however, came to the federal courts by way of a petition for habeas corpus. *See* 435 U.S. at 194, 98 S.Ct. at 1013. Congress, when it enacted the ICRA, purposefully restricted federal court interference with the proceedings of tribal courts to review on petitions for habeas corpus. *See Santa Clara Pueblo*, 436 U.S. at 67-70, 98 S.Ct. at 1681-1683. In asking that we recognize a civil cause of action arising under federal common law, National is requesting that we supplement a remedy Congress intended to be exclusive, and that we do so without statutory authority.

National's arguments for a common law cause of action are also not advanced by *Montana v. United States*. 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981). *Montana* arose as a declaratory judgment action brought by the United States in its trusteeship capacity. 450 U.S. at 549, 101 S.Ct. at 1250. The district court had jurisdiction of the suit under 28 U.S.C. § 1345 (1976). Moreover, *Montana* involved limitations of an Indian tribe's regulatory jurisdiction. 450 U.S. at 557-67, 101 S.Ct. at 1254-59. As noted above, a tribe's abuse of regulatory jurisdiction

may create a federal cause of action. A tribe's assumption of adjudicatory jurisdiction, however, does not.

The judicial recognition of a cause of action arising under federal common law is an unusual course, to be approached cautiously. *Milwaukee v. Illinois*, 451 U.S. 304, 312-14, 101 S.Ct. 1784, 1789-91, 68 L.Ed.2d 114 (1981). In view of Congress's manifest purpose to limit the intrusion of federal courts upon tribal adjudication, *see Santa Clara Pueblo*, 436 U.S. at 67-70, 98 S.Ct. at 1681-1683, we decline to recognize a common law cause of action in addition to the limited remedies available under the ICRA. We conclude that National may not assert its claim as one arising under common law. National's complaint must be dismissed for failure to state a claim for federal relief.[4]

The district court was rightly concerned that there must be a "proper forum wherein the extent of tribal court jurisdiction can be determined. . . ." 560 F.Supp. at 215. However, the proper forum for this determination, at least in the first instance,[5] is not a federal court but a tribal court. *See Santa Clara Pueblo*, 436 U.S. at 65, 98 S.Ct. at 1680; *R.J. Williams*, 719 F.2d at 983.

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[4] Because we conclude that National's complaint must be dismissed for failure to state a federal claim, we need not reach the other issues raised by the parties. We intimate no views on questions involving sovereign immunity, exhaustion of tribal remedies, state court jurisdiction over Sage's negligence suit or the merits of National's jurisdictional challenge.

[5] Should Sage seek to enforce his default judgment in the courts of Montana, National may, of course, challenge the tribal court's jurisdiction in the collateral proceedings. *See generally Durfee v. Duke*, 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963).

REVERSED.

EUGENE A. WRIGHT, Circuit Judge, dissenting in part and concurring in the result:

I agree that we must reverse but dissent from the holding that we lack subject matter jurisdiction. Instead, I would hold that the plaintiffs stated a federal common law cause of action, but would dismiss because they failed to exhaust tribal remedies.

I.

The court holds today that, while a plaintiff may state a federal common law cause of action for tribal abuse of its *regulatory* jurisdiction, it may not state a cause of action for abuse of its *adjudicatory* jurisdiction. This distinction lacks foundation in law or policy.

We have held that "the extent to which treaties and federal case law divest [a] tribe of the power to exercise civil jurisdiction over non-Indians" presents a federal question under 28 U.S.C. § 1331 (1982). *Babbitt Ford, Inc.* v. *Navajo Indian Tribe*, 710 F.2d 587, 591 (9th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1707, 80 L.Ed.2d 180 (1984). *Accord, Cardin* v. *De La Cruz*, 671 F.2d 363, 365 (9th Cir. 1982), *cert. denied*, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982).

It is clear too that a plaintiff may state a federal cause of action for improper taxation by an Indian tribe. *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982); *Snow* v. *Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 2655, ___ L.Ed.2d ___ (1984).

The majority distinguishes these cases by noting that they all concerned alleged abuses of tribal regulatory jurisdiction, while our case concerns action by a tribal

court. This distinction cannot be found in the cases and rests upon a strained reading of their facts.

Both *Babbitt Ford* and *Cardin* involved underlying actions in tribal courts against non-Indians. In *Babbitt Ford*, the tribal court held the non-Indian violated a tribal repossession regulation. 710 F.2d at 590-91. In *Cardin*, the tribal court closed a grocery store based on the owner's non-compliance with tribal building, health, and safety regulations. 671 F.2d at 364-65. In each, the tribal court action was the immediate cause of the federal claim.

Admittedly, in each case the tribal court applied a rule of decision supplied by tribal regulations. It is difficult to believe, however, that our jurisdiction should turn on the *source* of the tribal rule.

If the tribal court in *Cardin* had closed the grocery store because it was deemed a public nuisance under tribal common law, the harm to the owner and the implicit question of tribal authority would have been the same. Under the majority's analysis, the closure based on tribal regulations would create a federal question while the closure based on the tribal court's interpretation of common law would not.

The distinction between adjudication and regulation may have some application in this area of law. Adjudicatory jurisdiction is often broader than regulatory jurisdiction, because a forum's authority to adjudicate a controversy does not depend on its authority to regulate the underlying subject matter. *See supra*, at 1316 n. 3, *and cases cited therein*. But this distinction goes to the merits. It involves the propriety of the tribal court's assertion of jurisdiction. It does not affect the existence of a federal question.

The majority suggests that recognizing a cause of action for abuse of tribal court jurisdiction would conflict with *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). There, the Supreme Court held that habeas corpus provides the sole federal remedy for alleged violations of the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301-1341 (1982). 436 U.S. at 70, 98 S.Ct. at 1683.

As noted above, however, *Santa Clara Pueblo* has not prevented us from finding that a federal *common law* cause of action exists for abuse of tribal jurisdiction. *Babbitt Ford*, 710 F.2d at 591; *Cardin*, 671 F.2d at 365. Neither *Santa Clara Pueblo* nor the ICRA provide a basis for distinguishing between regulatory and adjudicatory actions by tribes.

The ICRA applies broadly to tribal "powers of self-government" which include "all governmental powers possessed by an Indian tribe, executive, legislative and judicial, and all offices, bodies, and tribunals by and through which they are executed." 25 U.S.C. §§ 1301(2), 1302. *Santa Clara Pueblo* did not distinguish between regulatory and judicial actions. In fact, the underlying dispute involved a tribal regulation. 436 U.S. at 51, 98 S.Ct. at 1673. A federal common law cause of action for abuse of tribal jurisdiction would be no more intrusive here than in *Babbitt Ford*, *Snow*, or *Cardin*.

Although I question the majority's distinction between regulation and adjudication, I would join its opinion if I agreed that it was compelled by *R.J. Williams Co.* v. *Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983), *petition for cert. filed*, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (U.S. April 27, 1984).

R.J. Williams involved a claim for damages by a contractor against a tribal housing authority which had

obtained a tribal court writ seizing the contractor's property. The suit alleged jurisdiction based on diversity, the United States Constitution, the ICRA, and 42 U.S.C. § 1983. It did not allege general federal question jurisdiction under federal common law, as in *Babbitt Ford* and *Cardin*. We held that the plaintiffs failed to allege a proper basis for federal court jurisdiction. *Id.* at 985.

General federal question jurisdiction might have been proper in *R.J. Williams*, at least for the portions of the complaint which sought non-monetary relief. But the plaintiff's failure to allege or argue this basis for our jurisdiction distinguishes *R.J. Williams* from the present case. *See Cardin*, 671 F.2d at 365 n. 2 (distinguishing *Trans-Canada Enterprises, Ltd.* v. *Muckleshoot Indian Tribe*, 634 F.2d 474 (9th Cir. 1980), because the plaintiff there had not alleged general federal question jurisdiction).

I conclude that plaintiffs have stated a substantial federal question. Subject matter jurisdiction over their claim was proper under 28 U.S.C. § 1331.

II.

My difference with the majority does not stem from any fundamental conflict over the policies at stake. Tribal courts are appropriate forums for the resolution of many disputes involving both Indians and non-Indians. *Santa Clara Pueblo*, 436 U.S. 65, 98 S.Ct. 1680. Federal courts must be hesitant to intervene in their proceedings, both as a matter of comity and to further the federal policy of protecting and strengthening tribal institutions. *Janis* v. *Wilson*, 521 F.2d 724, 727 (8th Cir. 1975), *See Santa Clara Pueblo*, 436 U.S. at 62-64, 98 S.Ct. at 1679-1680.

I agree with the majority that the "proper forum for [determining the scope of tribal court jurisdiction], at least in the first instance, is not a federal court but a tribal

court." *See supra,* at 1323. The plaintiffs never afforded the tribal court the opportunity to rule on their jurisdictional claim. That alone makes federal court intervention at this stage inappropriate.

The majority, however, makes the tribal court the first *and last* arbiter of its own jurisdiction. An assertion of tribal court jurisdiction, no matter how far reaching, would not be subject to review in any federal court. If, for instance, a tribal court decided to adjudicate a controversy between a non-Indian plaintiff and a non-Indian defendant involving matters arising outside the reservation, its power would be limited only by the presence of seizable assets within the reservation. *See supra*, at 1324 n. 5 (indicating that tribal court defendants may seek review of tribal jurisdiction in collateral enforcement proceedings).

The interests that counsel non-intervention in tribal proceedings can be accommodated by less drastic means. Specifically, we should require plaintiffs to exhaust their remedies in tribal courts before seeking federal intervention.

There is precedent for this approach. Before the Supreme Court decided that the ICRA did not confer general federal jurisdiction over Indian civil rights actions, *Santa Clara Pueblo,* 436 U.S. at 72, 98 S.Ct. at 1684, we imposed an exhaustion requirement on plaintiffs seeking to bring those claims. *See, e.g., Howlett* v. *Salish & Kootenai Tribes of the Flathead Reservation,* 529 F.2d 233, 239 (9th Cir. 1976); *St. Marks* v. *Chippewa-Cree Tribe of Rocky Boy Reservation,* 545 F.2d 1188 (9th Cir. 1976). *Accord, McCurdy* v. *Steele,* 506 F.2d 653, 656-57 (10th Cir. 1974); *O'Neal* v. *Cheyenne River Sioux Tribe,* 482 F.2d 1140 (8th Cir. 1973).

The exhaustion requirement stated in these cases is not inflexible. *St. Marks,* 545 F.2d at 1189. To determine

whether exhaustion is appropriate in a given case, we must first determine whether (1) meaningful tribal remedies exist, and (2) exhaustion will serve the purposes of comity and strengthening tribal institutions. Finally, the court must balance the need to preserve and strengthen tribal institutions against any immediate need that would exist to adjudicate the plaintiff's alleged federal rights. *Id.*

Applying that test here, it seems that meaningful tribal remedies exist. The Crow Tribal Code would allow the plaintiffs to challenge the tribal court's jurisdiction. Crow Rules of Civil Procedure, Rules 7(a) (permitting challenge to lack of personal or subject matter jurisdiction), 17 (permitting motion to set aside default judgment).

Second, requiring exhaustion here would strengthen the tribal court system. The plaintiffs ignored that system and instead attempted to circumvent it by suing immediately in federal court. Such disrespect for tribal institutions should be discouraged.

Finally, our interest in respecting and upholding the authority of the tribal court to determine, in the first instance, its own jurisdictional bounds exceeds any immediate need for federal court jurisdiction asserted by the plaintiffs. These factors indicate that the district court should have required the plaintiffs to exhaust their tribal remedies.

III.

The majority and I reach the same result by significantly different paths. I fear, however, that the majority's jurisdictional approach will haunt us in other cases, by creating unworkable distinctions and by barring relief in cases where it is necessary and appropriate. In contrast, the exhaustion approach is flexible and closely tailored to the interests at stake.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

No. CV 82-230-BLG

NATIONAL FARMERS UNION
INSURANCE COMPANIES, a Utah corporation,
and Lodge Grass School District No. 27,
Plaintiffs,

v.

CROW TRIBE OF INDIANS OF MONTANA, the Crow Indian Tribal Council, the Tribal Court of the Crow Indian Reservation, Eddie Roundface, Glen Birdinground, Ira Left Hand, Judges of the Tribal Court of the Crow Indian Reservation, Donald Stewart, Chairman of the Crow Indian Tribal Council, and Leroy Sage, a minor, by Flora Not Afraid, his guardian, Defendants.
Defendants.

United States District Court,
D. Montana,
Billings Division.

Jan. 26, 1983

School district and its insurer sought preliminary injunction preventing injured schoolboy from executing on the default judgment taken in Indian tribal court against school district. The District Court, Battin, Chief Judge, held that: (1) Indian tribal court lacked jurisdiction over tort claim between injured Indian schoolboy and school district for injuries sustained on school property located within exterior boundaries of reservation but owned by state; (2) state court of Montana had jurisdiction over

controversy; and (3) school district and its insurer were entitled to injunction preventing enforcement of default judgment.

Ordered accordingly.

Rodney T. Hartman, Herndon, Harper & Munro, Billings, Mont., and James Seykora, Hardin, Mont., for plaintiffs.

Francis Lamebull, Harlem, Mont., Thomas R. Acevedo, Fredericks & Pelcyger, Boulder, Colo., for Crow Tribe defendants.

Clarence T. Belue, Hardin, Mont., for defendant Leroy Sage, a minor, by Flora Not Afraid, his guardian.

MEMORANDUM OPINION

BATTIN, Chief Judge.

This matter is before the Court on plaintiff's application for preliminary injunction and motions to dismiss by the defendants. For the reasons discussed below, this Court has determined that the Crow Tribal Court did not have subject matter jurisdiction over the civil suit that formed the basis for the Crow Tribal Court action that is sought to be enjoined. Because the opinion of the Court is dispositive of the instant case as it concerns this Court, a permanent injunction will issue.

FACTS

On May 27, 1982, Leroy Sage, an enrolled Indian of the Crow Tribe and a minor, was struck by a motorcycle in the Lodge Grass Elementary School parking lot while returning from a school-sponsored activity. The land on which the Lodge Grass School is located, although within the exterior boundaries of the Crow Reservation, is owned by the State, with a mineral reservation held by the Tribe. *Crow Allotment Act of 1920* § 16. Leroy Sage

suffered a broken leg for which medical bills, presently incurred and estimated future expenses, total $3000. Through his guardian Flora Not Afraid and attorneys, Leroy Sage brought suit against Lodge Grass School District No. 27 in Crow Tribal Court requesting $153,000 in damages ($150,000 pain and suffering, $3000 actual and future medical expenses).

Process was served by Dexter Falls Down on Wesley Falls Down, School Board Chairman for Lodge Grass School District No. 27. For some reason, Wesley Falls Down failed to notify anyone that a suit had been brought for the injuries to Leroy Sage. The principal, secretary and superintendent of the Lodge Grass Elementary School and directors of the Lodge Grass School District No. 27 (excluding, presumably, Mr. Falls Down) had no knowledge of the suit. Because no one notified National Farmers Union Insurance Companies [National Farmers], the insurance carrier, no preparation to investigate or defend the claim was made.

According to documents filed with this Court, service of summons and complaint was made by Dexter Falls Down on Wesley Falls Down on September 28, 1982. A default judgment was taken on October 19, 1982, twenty-one days after service was made on Wesley Falls Down. A copy of the default judgment was hand delivered by Wesley Falls Down to the principal of Lodge Grass Elementary School in late October. The insurer of the Lodge Grass School District No. 27, plaintiff in this action, was unaware of the claim and judgment until its local adjuster received from the school principal a copy of the $153,000 judgment on October 29, 1982.

PROCEDURE

On November 3, 1982, plaintiff received a temporary restraining order from this Court retraining Leroy Sage

from executing on the default judgment taken October 19, 1982 in Crow Tribal Court. The temporary restraining order expired on November 13, 1982, and was not renewed. A hearing on defendants' motion to dismiss and plaintiffs' request for a preliminary injunction was held on December 14, 1982. On December 29, 1982, this Court issued an order granting plaintiffs a permanent injunction against any execution of the Tribal Court judgment. The rationale for the injunction was that the Crow Tribal Court lacked subject matter jurisdiction over the tort that was the basis of the default judgment.

FEDERAL COURT JURISDICTION

The Crow Tribal Court [Tribal Court] cannot extend its jurisdiction beyond its legal limits. This Federal District Court has the jurisdictional power under 28 U.S.C. § 1331 to determine whether the Tribal Court has exceeded the lawful limits of its jurisdiction. Section 1331 gives district courts jurisdiction over "civil actions arising under the Constitution, laws, or treaties of the United States." The jurisdictional question raised by plaintiff's verified complaint, paragraph No. 14, places at issue the extent of tribal court civil jurisdiction over non-Indians as developed by the Supreme Court in *Montana* v. *United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981)—developments that are not drawn from any specific statute or treaty, but raise the overriding federal interest in determining the extent of tribal sovereignty and therefore form a part of federal common law. That federal question jurisdiction under 28 U.S.C. § 1331 can be based on federal common law is well settled. *See, Illinois* v. *City of Milwaukee, Wisconsin*, 406 U.S. 91, 99-100, 92 S.Ct. 1385, 1390-91, 31 L.Ed.2d 712 (1972).

This Court's adquisition of jurisdiction by way of federal common law to examine the correctness of a tribal

court's exercise of civil jurisdiction, is not a novel one. *Cardin* v. *DeLaCruz*, 671 F.2d 363 (9th Cir.1982) (Cardin); *Swift Transportation, Inc.* v. *John*, 546 F.Supp. 1185 (D.Ariz.1982) (Swift); *Babbitt Ford, Inc.* v. *Navajo Indian Tribe*, 519 F.Supp. 418 (D.Ariz. 1981). The necessity of a proper forum wherein the extent of tribal court jurisdiction can be determined can hardly be overemphasized.

Plaintiff initially claimed that the manner in which notice was given or not given in the tort claim on which default was taken, was a violation of the Indian Civil Rights Act, 25 U.S.C. § 1302 (ICRA). This Court may be without jurisdiction to determine if the ICRA was complied with by the Tribal Court. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); *Trans-Canada Enterprises, Ltd.* v. *Muckleshoot Indian Tribe*, 634 F.2d 474 (9th Cir.1980); *R. J. Williams Co.* v. *Fort Belknap Housing Authority*, 509 F.Supp. 933 (D.Mont.1981). *But see, Dry Creek Lodge, Inc.* v. *Arapahoe & Shoshone Tribes*, 623 F.2d 682 (10th Cir.1980). Because the Court finds that the Tribal Court did not have jurisdiction over the tort claim between Leroy Sage and the School district, there is no need to examine this Court's jurisdiction to determine if the ICRA was complied with by the Tribal Court.[1]

TRIBAL COURT JURISDICTION

An analysis of Tribal Court jurisdiction must begin with the nature of the parties and the location of the

[1] The Court leaves the tollowing issue for resolution at a later date: Does a violation of the Constitutional right to due process claimed by a non-Indian, arising out of an event occurring on non-Indian land within the boundaries of an Indian Reservation, state a claim for relief that may be litigated in federal court?

incident. There is no dispute that Lodge Grass School District No. 27 is a non-Indian; indeed, the School District is a subdivision of the sovereign government of the State of Montana. There is no dispute that the alleged tort occurred on school grounds, and that the school grounds are non-Indian land. *Crow Allotment Act of 1920*, § 16, printed in Kappler, *Indian Affairs: Laws and Treaties*, Vol. IV, p. 277 (1928).[2]

Does the Crow Tribal Court have subject matter jurisdiction over the tort claim of Leroy Sage against Montana School District of Lodge Grass No. 27? Here the Tribe seeks jurisdiction over a non-Indian, for events on non-Indian land, although within Reservation boundaries. If the Tribal Court is to have jurisdiction over the tort claim then it has jurisdiction because either: 1) the power has been delegated to the Tribe by Congress through statute, or by the President with advice and

[2] "That there is hereby granted to the State of Montana for common-school purposes sections 16 and 36 within the territory described herein, or such parts of said sections as may be non-mineral or nontimbered, and for which the said State has not heretofore received indemnity lands under existing laws; and in case either of said sections or parts thereof is lost to the State by reason of allotment or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized to select other unoccupied, unreserved, nonmineral, nontimbered lands within said reservation, not exceeding 2 sections in any one township. The United States shall pay the Indians for the lands so granted $5 per acre, and sufficient money is hereby appropriated out of the Treasury of the United States not otherwise appropriated to pay for said school lands granted to the said State: *Provided*, that the mineral rights in said school lands are hereby reserved for the benefit of the Crow Tribe of Indians as herein authorized: *Provided further*, that the Crow Indian children shall be permitted to attend the public schools of said State on the same condition as the children of white citizens of said State."

consent of the Senate through a treaty, or 2) the power has been retained by the Tribe as an element of inherent sovereignty even after the Tribal nation became a quasi-sovereign within the exterior boundaries of the United States.

A thorough search of the relevant literature has failed to reveal any congressional legislation or treaties delegating civil jurisdiction over non-Indians to the Crow Tribe. The Tribal Court extended its jurisdiction to the tort on the basis of the Crow Tribal Code [CTC], § 3-2-205, which states: "The Crow Tribal Court shall have jurisdiction over all civil causes of action arising within the exterior boundaries of the Crow Indian Reservation. . . ." It is apparent that the breadth of this jurisdictional granting statute is, at least, limited by decisions of the United States Supreme Court. While the Tribe may point to CTC § 3-2-205 as a jurisdictional grant, there is no statutory grant from the United States Congress or treaty that gives the Crow Tribe power to give itself such a broad jurisdictional grant.

The remaining basis on which the Tribe could assert jurisdiction—retained power of inherent sovereignty—was recently dealt with by the United States Supreme Court in *Montana* v. *United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) (*Montana*). *Montana* established "that the dependent status of Indian Tribes has implicitly divested the tribes of the power to regulate, *in general*, 'the conduct of non-Indians on land no longer owned by, or held in interest for the tribes.' " *Cardin* at 366 (emphasis in original) (citation omitted).

The general rule, as stated in *Montana*, in favor of a lack of Tribal jurisdiction over the non-Indian defendant when the contested circumstances occurred on land no

longer owned by or held in trust for the Tribe was qualified by Justice Stewart in *Montana:*

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on the reservations, even [though] on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *Montana*, at 565-66, 101 S.Ct. at 1258 (citations omitted).[3]

Next, it must be determined if the factual circumstances of the alleged tort are within either of *Montana's* narrow exceptions allowing Tribal jurisdiction over non-Indians. Is the dispute between the school district and the injured schoolboy one that questions the Tribe's ability to regulate, through taxation or licensing, the activity of the non-Indian school district? No, the dispute does not involve a contract, lease or other consensual commercial arrangement; instead, a personal injury is the center of the dispute. Hence, there is no Tribal jurisdiction over

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[3] It is worth noting that the dissenting opinion in *Montana*, joined by two Justices, dissents from the opinion of the Court only with respect to its holding that treaty provisions did not retain ownership of the bed of the Big Horn River in the Crow Tribe. *Montana* at 569, 101 S.Ct. at 1259. The dissenters apparently agree with the analysis of the majority, as applied in the instant case by the Court, holding that inherent sovereignty without a treaty or congressional approval is insufficient to give tribal court jurisdiction over civil disputes involving non-Indians for events on non-Indian land.

the alleged tort based on any "consensual relationship" between the Tribe and the school district and, therefore, the first exception to the general rule does not apply.

The second exception to the general rule in *Montana* that may allow Tribal court jurisdiction over non-Indians, speaks to non-contract claims. A Tribe may retain civil jurisdiction over the conduct of non-Indians on fee lands within the reservation when the conduct in question threatens or has some direct effect on the political integrity, the economic security, or the health or welfare *of the Tribe*. *Montana*, at 566, 101 S.Ct. at 1258-59. Emphasis is properly placed on the final phrase of the test: "of the tribe." A personal injury obviously affects the health and welfare of the injured individual, but an individual is not a Tribe. It cannot be reasonably argued that the injuries to Leroy Sage affect the health and welfare of the Crow Tribe. Therefore, neither prong of the exceptions to the general rule in *Montana* analysis is satisfied and it must be concluded that the Tribal court is without jurisdiction to pass judgment on the alleged tort.

This Court's focus on the lack of effect of the tort claim on the Crow Tribe, *qua* tribe, has substantial case law support as the following quotation from *Swift* reveals:

> The Court of course understands that an automobile accident [involved in Swift] can have a "direct effect on . . . the economic security, or the health or welfare "of the individuals involved." Under this second portion of the test, however, the focus is on the interests of the Tribe rather than the interests of the individual members of the Tribe. This distinction is reflected in the cases cited in *Montana*, as well as subsequent cases applying this aspect of the test. *Cardin, supra*, 519 F.Supp. 418 (tribe's interest in enforcing building, health and safety regulations); *Knight* v. *Shoshone and Arapahoe Indian Tribes*, 670 F.2d 900 (tribe's interest in enforcing zoning ordinance); *Babbitt Ford, supra*, 519 F.Supp. 418 (tribe's interest in enforcing repossession statute). Limiting Tribal Court jurisdiction over non-Indians to cases involving a direct effect on the Tribe itself is also consistent with *Montana's* "general proposition" that Tribal powers do not extend to non-members. *Swift* at 1193.

Tribal interests are not threatened by eliminating tribal jurisdiction to try a single tort. The Tribe may respond that an abundance of torts considered collectively and not individually, may, in some way, threaten Tribal sovereignty. But this argument of aggregation must fail because it destroys the distinction made by the Supreme Court between matters that do affect the welfare of the Tribe, and those matters that do not. If such aggregates were considered to confer Tribal Court jurisdiction and the aggregate but not the individual event was sufficient to grant Tribal jurisdiction, then the distinction between individual controversies that do and do not warrant Tribal jurisdiction disappears. The distinction disappears because, presumably, all individual circumstances insufficient in themselves to confer Tribal Court jurisdiction could be hypothetically aggregated to yield an effect sufficient for the Tribe to invoke jurisdiction. This Court cannot consider an argument that so directly contradicts the holding in *Montana*; we can consider only the effect of the single tort on the Tribe as a whole and not a hypothetical aggregation.

As those familiar with Indian law are aware, the law changes rapidly in this area. An old case is old law. The Tribe points to *Williams* v. *Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959) for the proposition that the Tribe has jurisdiction over civil claims against non-Indians. In this Court's opinion, the concern of *Williams*—that the exercise of state court jurisdiction would infringe on the right of reservation Indians to make

their own laws and be ruled by them—does not exist here. Further, the *Montana* analysis specifically addresses the civil jurisdiction of a Tribe over non-Indians, while *Williams* held that it was "immaterial that respondent is not an Indian." *Williams*, at 223, 79 S.Ct. at 272.

The above analysis of Tribal court jurisdiction shows that civil jurisdiction over torts committed by non-Indians is not necessary to protect Tribal self-government, economic security or the health and welfare of the Tribe and, hence, cannot survive without express Congressional approval. Congress has not delegated that power to the Tribe. Therefore, when the Tribe extended its civil jurisdiction to include the suit between Leroy Sage and the Lodge Grass School District, the Tribe was asserting a power it did not have. *See, UNC Resources, Inc.* v. *Benally*, 518 F.Supp. 1046 (Ariz.1981).

STATE COURT JURISDICTION

If the Tribal Court does not have jurisdiction over the claim of Leroy Sage against the School District, is Sage without a court of competent jurisdiction to hear his claim? No, the state courts of Montana are the proper courts for his claim against the School District. It is inconceivable that the United States Supreme Court in *Montana* would obligate this Court to apply a jurisdictional test that would allow a wrong to occur without a forum to redress that wrong.

Because the tort claim does not present grounds for federal jurisdiction, the tort belongs in state court. "[A]n Indian has the same rights as are accorded to any other person to invoke the jurisdiction of state courts to protect his legal rights in matters not affecting either the federal government or tribal relations. . . . The propriety of suits by Indians against non-Indians in state courts has been recognized and approved by the Supreme Court of

the United States [in] *Williams* v. *Lee*, 358 U.S. 217 [79 S.Ct. 269, 3 L.E.d.2d 251] (1959)." *Paiz* v. *Hughes*, 76 N.M. 562, 417 P.2d 51, 52 (N.M.1966) (citations omitted).

The state district court of Montana should not be reluctant to take jurisdiction over this tort claim simply because there is an Indian plaintiff. "Enrolled members of Indian tribes within Montana are citizens of the United States and citizens of Montana. An Indian is entitled, as any other citizen to bring an action in the courts of this state." *Bad Horse* v. *Bad Horse*, 163 Mont. 445, 449, 517 P.2d 893, *cert. denied*, 419 U.S. 847, 95 S.Ct. 83, 42 L.E.d.2d 76 (1974). *See also, Woodtick* v. *Crosby*, 169 Mont. 38, 544 P.2d 812 (1976); *McCrea* v. *Busch*, 164 Mont. 442, 524 P.2d 781 (1974); *Iron Bear* v. *District Court*, 162 Mont. 335, 512 P.2d 1292 (1973).

REMEDY

This Court will issue a preliminary injunction to prevent execution of the Tribal Court default judgment if the test set out by the Ninth Circuit Court in *William Inglis & Sons Baking Company* v. *ITT Continental Baking Company*, 526 F.2d 86 (9th Cir.1975), has been met. The test requires that the party seeking the injunction show either probable success on the merits of the controversy and the possibility of irreparable injury, *or* that serious questions are raised and the balance of hardships is tipped sharply in favor of the party seeking the injunction. *Id.* at 88.

As the previous sections of this opinion set forth, the Tribal Court was without jurisdiction in the dispute between Leroy Sage and the School District. The defendant School District and its insurer, National Farmers, face serious harm if the invalid judgment is executed upon, and that harm clearly outweighs any burden an injunction

would impose on Leroy Sage. Without an injunction, the School District is threatened by irreparable harm in that the School District may be forced to pay, without its day in Court, a $153,000 default judgment for the broken leg suffered by Leroy Sage. Without the intervention of this Court, there is no other recourse available to the School District. This opinion establishes the success of the School District based on the claim that the Crow Tribal Court was without jurisdiction; hence a preliminary injunction is proper.

Because this Court finds a lack of Tribal Court jurisdiction, this ruling is therefore dispositive of the matter, and it is appropriate for a permanent injunction to issue. The permanent injunction issued by this Court enjoins Leroy Sage, his guardian Flora Not Afraid, and anyone acting on their behalf from attempting to enforce or execute the default judgment issued by the Crow Tribal Court in its case No. Civil 82-287, or from attempting to enforce any Crow Tribal Court judgment based on the injury suffered by Leory Sage at the Lodge Grass School on or about May 27, 1982.

CONCLUSION

In the words of Felix Cohen, "the extent of Tribal civil jurisdiction over the non-Indian is not fully determined." F. Cohen, *Handbook of Federal Indian Law*, p. 253 (1982 ed.). This Court has followed the analysis suggested by the Supreme Court in *Montana* for determining the extent of tribal civil jurisdiction over a non-Indian, and found that the commission of a tort by a non-Indian on non-Indian land does not sufficiently affect the health and welfare of the Crow Tribe to invoke Tribal jurisdiction. Because Tribal jurisdiction is absent and both parties in

the original tort claim are Montana citizens, the State of Montana can protect its interests and assert jurisdiction over the tort claim.

An appropriate order conforming to this Memorandum Opinion was issued by the Court on December 29, 1982.

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CLERK

No. 84-320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES; and LODGE GRASS SCHOOL DISTRICT NO. 27,

Petitioners,

v.

CROW TRIBE OF INDIANS; LEROY SAGE, a minor; FLORA NOT AFRAID, his guardian; THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; EDDIE ROUNDFACE, GLEN BIRDINGROUND, and IRA LEFT HAND, Judges of the Tribal Court of the Crow Indian Reservation; CROW INDIAN TRIBAL COUNCIL; and DONALD STUART, Chairman of the Crow Indian Tribal Council,

Respondents.

On Petition For a Writ of Certiorari to The United States Court of Appeals For The Ninth Circuit

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BRIEF OF GLACIER COUNTY, MONTANA AND OF THE EAST GLACIER COUNTY WATER & SEWER DISTRICT AS AMICUS CURIAE IN SUPPORT OF PETITION

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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

13 pp

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE	2
REASONS FOR GRANTING THE WRIT OF CERTIORARI	3
I. Summary of Argument	3
II. Argument	3
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:	Page
Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983), cert. denied, 104 S.Ct. 1707 (1984)	6
Blackfeet Tribal Business Council v. East Glacier County Water and Sewer District, 11 Indian Law Reporter 6021, (1983)	6
Blackman v. Glacier County, Cause No. 84 CA 347, Blackfeet Tribal Court	8, 9
Cardin v. DeLaCruz, 671 F.2d 363 (9th Cir. 1982) cert. denied, 103 S.Ct. 293 (1982)	6
East Glacier County Water and Sewer District v. The Blackfeet Tribe et al, Cause No. CV 84-33-GF (D.Mont. Great Falls Division)	6, 9
Snow v. Quinalt Indian Nation, 709 F.2d 1319 (9th Cir. 1983)	6
State of Montana ex rel Department of Health & Environmental Sciences v. Sitzman, Cause No. DV 84-091 (Ninth Judicial District Court, Glacier County, Montana)	8
Quechan Tribe of Indians v. Rowe, 531 F.2d 408 (9th Cir. 1976)	4, 6
STATUTES:	
Title 7, Chapter 13, Parts 22 & 23 MCA	2
Title 75, Chapter 10, Part 5 MCA	7
Wheeler Howard Act, 48 Stat. 986	3
28 USC Section 1331	6
MISCELLANEOUS:	
Article VI, Section 1(k) Constitution and By-laws for the Blackfeet Tribe of the Blackfeet Indian Reservation, Montana, 1935	3

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Respondents.

On Petition For a Writ of Certiorari to The United States Court of Appeals For The Ninth Circuit

BRIEF OF GLACIER COUNTY, MONTANA AND OF THE EAST GLACIER COUNTY WATER & SEWER DISTRICT AS AMICUS CURIAE IN SUPPORT OF PETITION

Glacier County, Montana, and the East Glacier County Water and Sewer District urge that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on July 3, 1984, in the above cause reported at 736 F. 2d 1320(1984). This brief amicus curiae is being filed pursuant to Rule 36.4, Rules of the Supreme Court.

INTEREST OF THE AMICUS CURIAE

Glacier County is a political subdivision of the State of Montana. The Blackfeet Indian Reservation is located almost entirely within Glacier County and of the approximate 10,600 residents of Glacier County, 6000 reside on the Blackfeet Reservation. Approximately 1500 of such persons are nonIndians. Property ownership includes Indian and nonIndian fee, trust, and Tribal ownership. The County provides a full range of legally-mandated services and programs to both Indian and nonIndian residents of the Reservation.

The East Glacier County Water and Sewer District is a public corporation organized and existing pursuant to Title 7, Chapter 13, Parts 22 & 23 MCA. The District was organized and formed to provide water and sewer services to an area essentially comprising the unincorporated community of East Glacier Park, Glacier County, Montana, and is entirely located within the exterior boundaries of the Blackfeet Indian Reservation. The District serves consumers which consist of nonIndians and members of the Blackfeet Tribe. At the present time the District is indebted to the Farmers Home Administration for loans of $679,000.00 for water and sewer system improvements. The income for the District to pay the principal, interest and reserve accounts for said loans and for its operation and maintenance costs is derived solely from user fees and connection charges which the District is, by law, required to levy and charge to its customers.

As explained below, the decision of the Ninth Circuit in the *National Farmers Union* case will have grave consequences to the operations on Indian reservations of political subdivisions such as Glacier County and of quasi-governmental organizations such as the East Glacier County Water and Sewer District.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. SUMMARY OF ARGUMENT

The practical effect of the Court of Appeals' decision in the *National Farmers Union* case is to deny nonIndian persons, businesses, and political entities residing, doing business on or located within Indian reservations, whether by choice or by legal requirement, the right to challenge, in a federal forum, the wrongful imposition of tribal court jurisdiction. The consequences of such decision can hardly be over-emphasized where the assertion of jurisdiction by the Indian tribal court may, as pointed out below, be clearly in excess of the tribe's own constitution and by-laws and where the economic and social consequences of such assertion of jurisdiction are extremely adverse to Indians and nonIndians alike. Without a federal forum in which to challenge tribal court jurisdiction, nonIndian persons, businesses and political subdivisions are without any protection whatsoever from the abuse of that jurisdiction and from the assertion and expansion of jurisdictional claims over them by Indian tribes.

II. ARGUMENT

A concrete example of the operation and effect of the Court of Appeals' decision is evidenced by the present situation involving the Blackfeet Tribe and the East Glacier County Water and Sewer District. The Blackfeet Tribe of the Blackfeet Indian Reservation is formed under the Wheeler Howard Act, 48 Stat. 986 and is incorporated under the laws of the State of Montana. Article VI, Section 1(k) of the Constitution and By-laws for the Blackfeet Tribe of the Blackfeet Indian Reservation, Montana, 1935, provides that:

> The council of the Blackfeet Reservation shall exercise the following powers, subject to any limitations embod-

ied in the statutes or the Constitution of the United States *and subject further to all express restrictions upon such powers contained in this constitution and the attached by-laws . . .*

To promulgate ordinances for the purpose of safeguarding the peace and safety of residents of the Blackfeet Indian Reservation, and to establish minor courts *for the adjudication of claims or disputes arising amongst members of the tribe*, and for the trial and punishment of *members of the tribe* charged with a commission of offenses set forth in such ordinances. (Emphasis supplied).

By virtue of the foregoing provisions in its Constitution and By-laws the jurisdiction of the Blackfeet Tribal Court is specifically limited to the adjudication of claims or disputes arising "amongst members of the tribe". At no place in its Constitution or By-laws has the Blackfeet Tribal Court been given any civil or criminal jurisdiction over nonmembers of the tribe or over claims or disputes involving nonmembers.

In *Quechan Tribe of Indians v. Rowe* 531 F.2d 408 (9th Cir., 1976) the Court of Appeals, in interpreting a clause in the Constitution and By-laws of the Quechan Tribe exactly the same as the above cited provision of the Blackfeet Tribal Constitution and By-laws, held that if the Quechan Tribe ever had the power to try nonmembers for violation of Tribal law, it had foresworn it by virtue of the provision in its Constitution limiting jurisdiction of the Tribe to members only. The Court stated:

It is argued on behalf of the tribe that its tribal court has the inherent authority to assert criminal jurisdiction over nonmembers of the tribe who violate tribal laws while on the reservation. This power is said to be found in general Indian law. We need not refer to

general Indian law to resolve the question in this case, however, because the answer is found in the Quechan Constitution itself. Article IV, Section 7 of that Constitution provides:

"The council shall have the power to promulgate ordinances... and to establish minor courts...for the trial and punishment of members of the tribe charged with a commission of offenses set forth in such ordinances." Consequently the Quechan Tribe, if it had the power to try nonmembers of the tribe for violation of tribal law, has foresworn it.

Notwithstanding its jurisdiction being specifically limited as set forth above, Blackfeet Tribe has and continues to assert civil jurisdiction over nonIndian persons, businesses and political entities within its Reservation boundaries.

The East Glacier County Water and Sewer District is a case in point. The District never has been and is not now a member of the Tribe and is not formed, authorized, licensed or regulated under any law, statute or other authority of the Tribe.

In the spring of 1983 the District notified certain of its consumers, including members of the tribe and nonmembers, of its intention to terminate their water and sewer services by reason of their failure to pay their accounts. On the basis of a complaint verified by a member of the Tribal Council (and one of the same individuals who had been served with a notice of discontinuance) the Blackfeet Tribal Court issued, without notice to the District, a Temporary Restraining Order prohibiting it from discontinuing water and/or sewer service to any member of the Tribe.

The District entered its special appearance in Tribal Court challenging its jurisdiction, citing the Tribal constitu-

tional limitations referred to above and the *Quechan* case. Nevertheless, in November 1983 the Tribal Court ruled that it had jurisdiction over the Plaintiff; that its Temporary Restraining Order would remain in effect; and that pending a trial on the merits the District was enjoined from terminating water or sewer service to any member or nonmember. See *Blackfeet Tribal Business Council v. East Glacier County Water and Sewer District*, 11 Indian Law Reporter 6021, (1983).

Following the entry of the Tribal Court's decision the District filed an action in Federal District Court in Great Falls, Montana, challenging the jurisdiction of the Tribal Court. The District brought its action under 28 USC Section 1331. The Tribe moved to dismiss for lack of jurisdiction. On the basis of *Cardin v. DeLaCruz*, 671 F.2d 363 (9th Cir. 1982) cert. denied, 103 S.Ct. 293 (1982); *Snow v. Quinalt Indian Nation*, 709 F.2d 1319 (9th Cir. 1983); and *Babbitt Ford Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983) cert. denied, 104 S.Ct. 1707 (1984), the court initially concluded that the District had stated a federal claim cognizable under 28 USC Section 1331. It subsequently reversed itself and dismissed the District's Complaint in the wake of the *National Farmers Union* decision. *East Glacier County Water and Sewer District v. The Blackfeet Tribe et al*, Cause No. CV 84-33-GF (D.Mont. Great Falls Division).

As a consequence of the Tribal Court's Restraining Order, the District has been unable to collect sufficient user fees to service its debt obligations to the Farmers Home Administration and to many of its other creditors. At this point in time there is the very real possibility that the District will be unable to continue its business operations with the resulting loss of water and sewer services to the Indian and nonIndian residents of East Glacier Park, Montana, and the default on

substantial loans made to the District by the federal government through the FmHA.

It must be emphasized that political subdivisions such as Glacier County and public corporations such as the East Glacier County Water and Sewer District either locate or do business and provide services on the Indian reservations not so much by choice, as by legal requirement or by reason of the fact that certain necessary services would not otherwise be provided by any governmental entity.

In the case of the East Glacier County Water and Sewer District the previously existing water and sewer systems had been in part privately owned and in part maintained by Glacier County. The improvement of those systems was the end result of an election by the nonIndian and Indian persons in East Glacier Park to better their situation by forming their own State created water and sewer district which now owns and operates the improved water and sewer systems. Despite the District's attempts to seek participation from the Blackfeet Tribe in the water and sewer projects, such assistance was denied by the Tribe.

In the case of Glacier County, Montana, it, by State law, builds and maintains county roads on the Reservation, operates two school districts, operates school bus routes, provides county welfare services, provides law enforcement through the Glacier County Sheriff's office, provides justice of the peace services, provides rural fire protection and provides certain health-related services. Such services are provided to both Indian and nonIndian persons.

By way of example, Glacier County is legally required to enforce Montana's Motor Vehicle Recycling and Disposal laws (Title 75, Chapter 10, Part 5 MCA). On September 6th, 1984, the County, acting for the State Department of Health and Environmental Sciences, obtained a judgment in the

Ninth Judicial District Court in Glacier County, prohibiting a nonIndian from operating an unlicensed motor vehicle wrecking facility on fee patent land owned by another non-Indian in East Glacier Park, Montana. *State of Montana ex rel Department of Health and Environmental Sciences v. Sitzman*, Cause No. DV 84-091.

On September 27, 1984, when the Glacier County Road Department went to take possession of the junk vehicles pursuant to the State Court Order, the Blackfeet Tribal Court, on application of a tribal member claiming to be the lessee of the nonIndian's fee land, issued an injunction prohibiting the County from removing any vehicles, and thereby enforcing the State law and State Court Order against the nonIndian violators of the State Codes. *Blackman v. Glacier County*, Blackfeet Tribal Court Cause No. 84 CA 347.

Glacier County specially appeared and moved to dismiss the Tribal Court action based upon the fact that the County was proceeding against a nonIndian violating Montana State law on fee patent land owned by another nonIndian and based upon the jurisdictional limitations of the Blackfeet Tribal Court discussed above.

At a hearing on October 1st, the Tribal Court ordered both the nonIndian owner of the land and the claimed Indian lessee to comply with State law within 30 days. Nevertheless, the Tribal Court injunction remains in effect and the State has been put in the position of being unable to enforce its laws and court orders against its own nonIndian citizens violating those laws and court orders on nonIndian, fee patent land unless, apparently, the Tribal Court concurs. The Blackfeet Tribal Court, clearly, has no jurisdiction over the County or the subject matter of the lawsuit because of its own constitution and bylaws, but the County has

absolutely no court in which to challenge the Tribe's unlawful assertion of jurisdiction over its operations.

Under the *National Farmers Union* decision (and as the Blackfeet Tribal Court did in the *East Glacier County Water and Sewer District* and *Blackman v. Glacier County* cases), an Indian tribal court can, in violation of its own constitution and by-laws, assert jurisdiction over political subdivisions and quasi-governmental entities of the State, interfere with or bring to a halt the provision of vitally needed services to Indians and nonIndians alike, and be immune from any challenge to the wrongful assertion of such jurisdiction in federal court.

It should also be pointed out that, at least with respect to the Blackfeet Tribe, no person, business entity or political subdivision which is not a member of the Tribe has any participation or vote in its governmental operations or in its elections. In other words, the Tribal Council is elected solely by members of the tribe; and the Tribal Council adopts ordinances and rules, appoints the Tribal judges and funds the operations of the Tribal Court. Consequently, nonmembers of the tribe have absolutely no input or vote into the governmental processes and institutions which can and do directly and adversely influence their economic fortunes or working existence. This notwithstanding that, at least in the case of the political subdivisions, such entities may be doing business on the reservation only by law or public necessity.

The situation is not much better for the nonIndian landowner or businessman on the reservation. He has no voice in the tribal government yet is subject to the wrongful assertion of tribal court jurisdiction. In the wake of the *National Farmers Union* case, he has no forum in which to litigate his grievance or protect himself and his property from an abuse

of jurisdiction by the tribe other than in the very court that caused the problem in the first place.

As can be seen in the examples aforecited, the rule handed down by the Court of Appeals will have a profound, adverse and long term effect on the interaction, both legal and commercial, between persons, businesses and public institutions and entities living and doing business on Indian reservations. Such effects adversely impact both Indians and nonIndians alike.

CONCLUSION

The *National Farmers Union* case presents extremely important questions involving the ability of governmental entities, political subdivisions and quasi-governmental entities to function on Indian reservations and to provide to nonIndian and Indian inhabitants critical services necessary for health, welfare, education and safety.

Accordingly, this Court should grant the Petitioner's request for Writ of Certiorari to review the decision of the Ninth Circuit Court of Appeals in this case.

Respectfully submitted.

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Office - Supreme Court, U.S.
FILED
OCT 26 1984
ALEXANDER L. STEVAS
CLERK

No. 84-320

In The

Supreme Court of the United States

October Term, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES, et al.,

Petitioners,

v.

CROW TRIBE OF INDIANS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS CROW TRIBE OF INDIANS AND CROW TRIBAL OFFICIALS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a complaint challenging the Crow Tribal Court's assertion of civil jurisdiction over a tort suit brought by a tribal member based on an accident that took place within the Crow Reservation, states a federal claim for relief.

2. If federal courts do have such jurisdiction, whether exhaustion of the available Tribal Court remedies is required before the suit can be entertained by the federal courts.

3. Whether the Crow Tribal Court has jurisdiction over a tort suit brought by a tribal member against a local school district when the accident took place on fee lands owned by the school district within the Crow Indian Reservation, four of the nine school board members are Indian, and more than 85% of the children attending the school are enrolled members of the Crow Tribe.

TABLE OF CONTENTS

	Page
Statement of the Case	1
Summary of Argument	4
Argument	4
Conclusion	16
Appendix	1a

TABLE OF AUTHORITIES

CASES:

	Pages
Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982), *cert. denied*, 459 U.S. 967 (1982)	16
Clark v. Circus-Circus, 525 F.2d 1328 (9th Cir. 1975)	15
Confederated Salish & Kootenai Tribes, etc. v. Namen, 665 F.2d 951 (9th Cir. 1982) *cert. denied*, 459 U.S. 977 (1982)	16
DeCoteau v. District County Court, 420 U.S. 425 (1975)	11
Durfee v. Duke, 375 U.S. 106 (1963)	6
Expert Elec. Inc. v. Levine, 554 F.2d 1227 (2nd Cir. 1977), *cert. denied*, 434 U.S. 903 (1977)	10
Fisher v. District Court, 424 U.S. 382 (1976)	7
Graham v. Brotherhood of L.F.&E., 338 U.S. 232 (1949)	13
Howlett v. Salish & Kootenai Tribes, 529 F.2d 233 (9th Cir. 1976)	9
Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)	6, 8, 9
Janis v. Wilson, 521 F.2d 724 (8th Cir. 1975)	10
Juidice v. Vail, 430 U.S. 327 (1972)	8

TABLE OF AUTHORITIES—Continued

	Pages
Kennerly v. District Court, 400 U.S. 423 (1971)	7, 13
Knight v. Shoshone & Arapahoe Tribes, 670 F.2d 900 (10th Cir. 1982)	16
Knox County v. Harshman, 133 U.S. 152 (1890)	10
McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1975)	10, 16
Means v. Wilson, 522 F.2d 833 (8th Cir. 1975), *cert. denied*, 424 U.S. 958 (1976)	10, 16
Merrion v. Jicarilla Tribe of Apaches, 455 U.S. 130 (1982)	13, 14
Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973)	11
Montana v. United States, 450 U.S. 544 (1981)	7, 14, 15
Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1 (1983)	13
N.L.R.B. v. Clark, 468 F.2d 459 (5th Cir. 1972)	10
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)	15
O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140 (8th Cir. 1973)	10
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1977)	3, 6, 8, 9, 13
Singleton v. Wulff, 428 U.S. 106 (1976)	13
Stateside Machinery Co., Ltd. v. Alperin, 591 F.2d 234 (3d Cir. 1979)	10
Teamsters Pub. Emp. U. Loc. 594 v. City of West Point, Neb., 338 F.Supp. 927 (D. Neb. 1972)	12
Three Affiliated Tribes v. Wold Engineering, — U.S. —, 104 S.Ct. 2267 (1984)	14
Trainor v. Hernandez, 431 U.S. 434 (1977)	8

TABLE OF AUTHORITIES—Continued

	Pages
United States v. Mazurie, 419 U.S. 544 (1975)	13
Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980)	14, 15
Webb v. Webb, 451 U.S. 493 (1981)	8, 9
Williams v. Lee, 358 U.S. 217 (1959)	9, 13, 14
Younger v. Harris, 401 U.S. 37 (1971)	9, 12
CONSTITUTION, STATUTES, AND REGULATIONS:	
25 U.S.C. §§ 1301 *et. seq.*	6, 9
Rule 7, Crow Rules of Civil Procedure	10
Rule 17(d), Crow Rules of Civil Procedure	10, 11
Rule 2(a), Crow Rules of Appellate Procedure	11

No. 84-320

In The

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October Term, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES, et al.,

Petitioners,

v.

CROW TRIBE OF INDIANS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS CROW TRIBE OF INDIANS AND CROW TRIBAL OFFICIALS IN OPPOSITION

STATEMENT OF THE CASE

In May of 1982, Leroy Sage, a ten year old enrolled member of the Crow Tribe, was struck by a motorcycle on the grounds of the Lodge Grass Elementary School in Lodge Grass, Montana. The land on which the school is located is owned in fee by the Lodge Grass School District and is within the exterior boundaries of the Crow Reservation.

Leroy Sage subsequently filed suit in Crow Tribal Court through his guardian, Flora Not Afraid, in September, 1982. The complaint alleged that Sage's injuries were caused by the negligent and tortious conduct of the Petitioner Lodge Grass School District No. 27 ("the School District"), specifically, the unsafe condition of the school parking lots and inadequate supervision during school hours.

Eighty-five percent of the students in the School District are Crow tribal members. The Lodge Grass school board consists of nine members, of whom four are Crow Tribal members. See Appendix A, Brief of Appellant Crow Tribe of Indians, on appeal to the United States Court of Appeals for the Ninth Circuit.

The Chairman of the School District was served with process. However, the School District did not answer or otherwise appear in Tribal Court. Accordingly, on October 19, 1982, a default judgment was entered in Tribal Court against the School District. The Tribal Court mailed a copy of the default judgment to the Chairman of the School Board on October 25, 1982. Although Crow Tribal Court procedures permit parties against whom a default judgment is taken to move to set aside such judgments within 30 days, the School District took no action in Tribal Court.

Instead, on November 2, 1982, the School District and its insurer, the National Farmers Union Insurance Companies ("National Farmers"), filed suit in the Federal District Court for Montana. Named as Defendants were the Crow Tribal Court, Eddie Roundface, Glen Birdingground and Ira Left Hand, who are Judges of the Crow

Tribal Court, and Donald Stewart, Sr., Chairman of the Tribal Council (the "tribal defendants"). The complaint challenged the validity of the Tribal Court judgment against the School District and National Farmers, alleging that the Tribal Court lacked jurisdiction over the controversy and that the constitutional rights of the School District and National Farmers had been violated by the Tribal Court action.

On November 3, 1982, the Federal District Court issued a temporary restraining order enjoining Sage from executing the Tribal Court judgment. On December 29, 1982, the District Court permanently enjoined the defendants from executing the tribal court judgment on the grounds that the Tribal Court lacked jurisdiction over the tort claim. Pet. App. 14a-27a.

On July 3, 1984, the Court of Appeals unanimously reversed. Based on the reasoning of *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1977), as well as its own previous decisions, the majority found that the Crow Tribal Court was the proper forum for determining the extent of its own jurisdiction. Pet. App. 7a. Consequently, the majority concluded that the complaint must be dismissed for failure to state a claim for federal relief.

In a separate opinion, Judge Wright concurred in the majority's conclusion that the complaint must be dismissed, stating that his "difference with the majority does not stem from any fundamental conflict over the policies at stake." Pet. App. 11a. Although Judge Wright dissented from the holding that federal court review of tribal proceedings was precluded, he found such review to be appropriate only after exhaustion of tribal court remedies. Ex-

haustion was found to be required by the doctrine of comity and by "the federal policy of protecting and strengthening tribal institutions." Pet. App. 11a. Since the School District had not even made an appearance in Tribal Court, the available Tribal Court remedies had not been exhausted and consequently the complaint should have been dismissed. Neither the majority nor Judge Wright addressed the merits of the claim made by the School District and National Farmers that the Crow Tribal Court lacked jurisdiction over Sage's tort suit.

On August 22, 1984, petitioner school district appeared for the first time in the Crow Tribal Court, seeking to enjoin the sale of certain property which had been seized on August 1, 1984, pursuant to the default judgment. The School District also moved to have the default judgment set aside.

Following a hearing, the Tribal Court postponed the sale of the seized property and set a hearing date of September 19, 1984 for further consideration of the School District's Motion To Set Aside Default. App. to Opp. Br. 1a-7a. Further Tribal Court proceedings were continued following the August 23, 1984 and September 10, 1984 orders issued by Justice Rehnquist staying the Court of Appeals' mandate.

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SUMMARY OF ARGUMENT

The decision of the Court of Appeals for the Ninth Circuit is correct, is consistent with decisions of this Court and does not conflict with any decisions of the other circuits. Review is unwarranted, especially at this time. Granting review without requiring exhaustion of available tribal court remedies would unnecessarily impede the orderly progress of the Tribal Court proceedings, which provide ample opportunity for consideration of all of the petitioners' claims and contentions.

The Court of Appeals correctly ruled that the Crow Tribal Court is the proper forum for determining the scope of its jurisdiction, "at least in the first instance." Pet. App. 7a. The Court's decision is consistent with important principles of comity and exhaustion and with the firm federal policies supporting tribal authority over reservation matters. The Crow Tribal Court provides procedures for full and fair consideration of petitioners' claims and for appeal to a higher court. These procedures are similar to those available in a state court system and afford comparable protections for petitioners' rights. Circumvention of the Tribal Court's authority by the federal courts before the Tribal Court has had an opportunity to rule on the questions raised by the parties to the Tribal Court proceedings violates the same principles which preclude premature federal court intervention in state court proceedings. These policies and principles require that Petitioners seek recourse in the Crow Tribal Court in accordance with the decision of the Ninth Circuit Court of Appeals.

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ARGUMENT

A grant of certiorari in this case would be contrary to two separate and fundamental principles of jurisprudence. It is well established that courts must have jurisdiction to determine the scope of their own jurisdiction. *Durfee v. Duke,* 375 U.S. 106 (1963). In addition, absent certain exceptional circumstances, federal courts must exercise restraint to avoid interfering with proceedings pending in other courts. *Huffman v. Pursue, Ltd.,* 420 U.S. 592 (1975). Both of these principles support the opinion of the Court of Appeals for the Ninth Circuit.

1. The Court of Appeals was correct in ruling that federal court review of tribal court actions is precluded by this Court's opinion in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1977). *Martinez* involved the issue of a tribe's compliance with the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301 *et. seq* (ICRA), which applies most of the provisions of the Bill of Rights of the United States Constitution to Indian tribes. Even where the most fundamental rights were involved however, this Court found in *Martinez* that the Congressional intention to "protect tribal sovereignty from undue interference" would be frustrated by federal court review of the action of the tribal council. 436 U.S. at 63.

Significantly, this Court noted that tribal courts were available both to Indians and non-Indians to insure protection of their "important personal and property interests." 436 U.S. at 65. Those considerations are at least equally applicable to this case and compel the same conclusion, that federal court review constitutes an undue interference with the sovereignty of the Crow Tribe. In-

deed, considering that complaints alleging deprivations of fundamental constitutional rights by tribal officials are not cognizable in Federal Courts, it would be incongruous to hold that those same Courts can entertain suits challenging the scope of tribal court jurisdiction.

This Court has carefully and consistently guarded the crucial role of tribal courts in resolving civil disputes that arise on Indian Reservations. *Fisher v. District Court,* 424 U.S. 382 (1976); *Kennerly v. District Court,* 400 U.S. 423 (1971); *Williams v. Lee,* 358 U.S. 217 (1959). In this context, the application of the *Martinez* rationale in order to protect tribal courts from collateral attack in the federal courts is especially warranted.

Petitioners' references to *Moriana v. United States,* 450 U.S. 544 (1981), as evidence of a narrow interpretation of *Martinez,* are unavailing. *Montana* arguably may have some bearing on the permissible scope of tribal court jurisdiction. *See infra,* at 15. It has no relevance to the question of federal court jurisdiction, however, because *Montana* was brought by the United States and the Crow Tribe against the State of Montana, and was not a suit challenging the exercise of jurisdiction by tribal courts or tribal officials.

2. Assuming arguendo, that federal court review of tribal court proceedings may be authorized under certain circumstances, there remains the question of whether, as Judge Wright concluded in his concurrence, exhaustion of available tribal court remedies is a necessary prerequisite to federal court review. At this stage of the proceedings, denial of certiorari is appropriate under either the Ninth Circuit majority opinion or the concurrence, and would produce the same result. In either event, the petitioners

would be required to avail themselves of their tribal remedoes before proceeding in federal court. If petitioners obtain a favorable ruling in the tribal court, they will not have any need for federal review. If they are not satisfied with the results in the tribal court proceedings, they could then reinitiate their suit in federal court. At this point, where petitioners have made no effort even to seek tribal remedies, it is premature for any federal court to entertain their claims.

This Court has consistently recognized that federal courts should, as a matter of comity, avoid interfering in cases that are pending before the state courts. *Webb v. Webb,* 451 U.S. 493 (1981); *Trainor v. Hernandez,* 431 U.S. 434 (1977); *Huffman v. Pursue Ltd.,* 420 U.S. 592 (1975); *Juidice v. Vail,* 430 U.S. 327 (1972). This policy applies in both civil and criminal contexts where important state interests are involved, notwithstanding the existence of important federal questions and interests. *See, e.g., Huffman v. Pursue, Ltd, supra; Trainor v. Hernandez, supra.* As noted in *Huffman v. Pursue, Ltd., supra,* 420 U.S. at 604, federal restaint regarding pending state adjudications is particularly warranted because

> . . . interference with a state judicial proceeding prevents the State not only from effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies.

These principles and considerations equally require federal courts to refrain from interfering with pending procedures in tribal courts, to permit those courts to perform their vital function of peacefully resolving disputes that arise on Indian reservations. In *Santa Clara Pueblo*

v. Martinez, supra, this Court exercised judicial restraint in order to avoid interference with tribal proceedings, in accordance with the policy of preserving the "right of reservation Indians to govern themselves". 436 U.S. at 59, citing, *Williams v. Lee, supra,* 358 U.S. at 223 (1959). The interest of Indian tribes in preserving the authority of their tribal courts is a clear example of a sovereign interest justifying application of the comity doctrine in the civil context.[1]

The practical reasons for abstention, noted in *Webb v. Webb, supra,* 451 U.S. at 500, and *Huffman v. Pursue Ltd., supra,* 420 U.S. at 604, apply equally to tribal court proceedings. Judicial efficiency will best be achieved by affording tribal courts the opportunity to resolve the disputes brought before them. Indeed, prior to *Martinez,* when federal courts were reviewing complaints brought against tribal officials under the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301 *et. seq.,* the federal appellate courts throughout the West imposed the requirement that tribal remedies be exhausted prior to the filing of the Federal suit.[2]

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[1]In certain extraordinary circumstances, "when absolutely necessary for protection of constitutional rights," *Younger v. Harris, supra,* 401 U.S. at 45, federal intervention in state proceedings has been sanctioned. However, such intervention is permissible only in cases where "great and immediate" irreparable injury is imminet, such as where the pending state action is being adjudicated in bad faith, or the state remedies are inadequate. No extraordinary circumstances warranting intervention are present in this case.

[2]*See, e.g., Howlett v. Salish and Kootenai Tribes,* 529 F.2d 233, 239 (9th Cir. 1976); *Means v. Wilson,* 522 F.2d 833 (8th

(Continued on next page)

The principles of comity and exhaustion are particularly applicable and appropriate in this case. The Crow Tribal Court provides a forum for complete and fair resolution of the suit brought against petitioners and affords ample protections for petitioners' rights.

Petitioners were given notice of the initial complaint brought against them in Tribal Court. As is true in any Court, the validity of the service of process is not negated by the fact that the individual who was served failed to inform his colleagues of the suit. *Knox County v. Harshman,* 133 U.S. 152, 156 (1890); *Stateside Machinery Co., Ltd. v. Alperin,* 591 F.2d 234 (3rd Cir. 1979); *Expert Elec. Inc. v. Levine,* 554 F.2d 1227 (2nd Cir. 1977) *cert. denied* 434 U.S. 903 (1977); *N.L.R.B. v. Clark,* 468 F.2d 459 (5th Cir. 1972). But for their own internal lack of communication, petitioners could have appeared in the Crow Tribal Court and raised the issue of subject matter jurisdiction pursuant to Rule 7, Crow Rules of Civil Procedure (C.R.C.P.). The Tribal Court would then have had the opportunity to rule on the jurisdiction issue.

Even after the default judgment was entered against them, adequate remedies were available to petitioners in tribal court. Rule 17(d) of the Crow Rules of Civil Procedure (C.R.C.P.) provides that within 30 days of a default judgment, the party in default may move to set aside the

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(Continued from previous page)

Cir. 1975), *cert. denied,* 424 U.S. 958 (1976); *Janis v. Wilson,* 521 F.2d 724, 727 (8th Cir. 1975); *McCurdy v. Steele,* 506 F.2d 653, 656 (10th Cir. 1975); *O'Neal v. Cheyenne River Sioux Tribe,* 482 F.2d 1140 (8th Cir. 1973).

judgment for good cause shown. Rather than ignoring and circumventing the authority of the Crow Tribal Court by bringing suit in federal court in violation of the comity principles, petitioners could have filed a motion pursuant to Rule 17(d) C.R.C.P. and obtained a hearing on the merits of the case. Under the Orders of the Tribal Court issued on August 22, 1984, and September 19, 1984, App. to Opp. Br. 1a-7a, 13a-15a this remedy is still available to petitioners, in spite of their prior disregard for the Tribal Court.

In the event that petitioners were disatisfied with the tribal court ruling on the jurisdiction issue, or on the merits, further recourse is available within the Crow Tribal Court system. The Crow Tribal Court system, like most state court systems, is two-tiered. According to Rule 2(a), Crow Rules of Appellate Procedure, a judgment or order of the tribal court in a civil case may be appealed as a matter of right to the Crow Court of Appeals, thereby affording litigants as full and fair a resolution of their disputes as is available in state courts.

Furthermore, the requirement that petitioners assert their defenses in tribal court is consistent with and parallel to the rule that an Indian who commits a tort outside the reservation is subject to suit in state court. *See, DeCoteau v. District County Court,* 420 U.S. 425 (1975); *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148-49 (1973). Correspondingly, where a tribal court assumes jurisdiction over non-Indian defendants with respect to an occurrence that took place on the reservation and provides a forum in which the defendants' rights can be adjudicated, there is no justification for circumventing the Tribal Court's authority to rule on the scope of its own jurisdiction, at least in the first instance.

The sole justification presented by petitioners for avoiding exhaustion of available tribal court remedies is their assertion that imposition of that requirement would be "inappropriate considering the time and resources that have been invested in resolving this federal court action." Pet.6. The only authority cited in support of this novel proposition is a district court decision issued in 1972, before this Court had applied the comity principles of *Younger v. Harris,* 401 U.S. 37 (1971), to civil suits.[3] This Court has never recognized a "time and resources" exception permitting federal courts to interfere with pending state court proceedings.

There is no justification for allowing wealthy litigants to circumvent state or tribal court jurisdiction simply by expending large sums in attempting to have their claims heard in the federal courts. The principle of comity would be totally undermined if the exhaustion of available tribal court remedies could be avoided in this manner. Failure to respond to a summons issued by a judicial tribunal should not be rewarded.

3. The merits of this case, not reached by the Ninth Circuit, involve the scope of the jurisdiction of the Crow Tribal Court. If this Court decides to grant certiorari, its review should be limited to the first two threshold issues listed *supra* at (i) involving the propriety of federal court jurisdiction. If the Court grants certiorari and reverses the Ninth Circuit's holding that the federal court suit should be dismissed, the case should then be remanded back to that Court for consideration of the merits of the

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[3]*Teamsters Pub. Emp. U. Loc. No. 594 v. City of West Point, Neb.,* 338 F. Supp. 927 (D.Neb. 1972).

petitioners' claim that the Tribal Court lacks jurisdiction over the Sage's tort suit. This disposition is consistent with the rule that this Court will not consider an issue which was not ruled on by the court below, in the absence of exceptional circumstances. *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.* 460 U.S. 1 (1983); *Singleton v. Wulff,* 428 U.S. 106, 120 (1976); *Graham v. Brotherhood of L.F. & E.* 338 U.S. 232, 237 (1949).

In addition, the interests of efficiency will be served by limiting the scope of review at the certiorari stage of this case. Briefing on the merits of the Tribal Court jurisdictional issue can be avoided if any grant of certiorari is limited to the questions addressed by the Court of Appeals' majority and concurring opinions. Moreover, as demonstrated in Sec. 4, *infra,* the issue of whether the Crow Tribal Court has jurisdiction over a tort suit brought by a tribal member regarding an accident that occurred within the Reservation does not warrant review by this Court.

4. The principle of tribal jurisdiction over reservation matters, including those involving non-Indians, has been firmly established. *Merrion v. Jicarilla Tribe of Apaches,* 455 U.S. 130 (1982); *United States v. Mazurie,* 419 U.S. 544(1975); *Konnerly v. District Court,* 400 U.S. 423 (1971); *Williams v. Lee,* 358 U.S. 217 (1959). This principle applies with special force to the resolution of reservation disputes through tribal courts. As stated in *Santa Clara Pueblo v. Martinez, supra,* 436 U.S. at 65:

> Tribal Courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.

The District Court's opinion in this case was predicated on the premise that the well-established principles stated in *Williams v. Lee, supra,* were overruled by the more recent decision of *Montana v. United States,* 450 U.S. 544 (1981). Pet. App. 23a-24a. This premise is conclusively shown to be false by this Court's subsequent reliance on the continuing vitality of *Williams v. Lee, supra,* as recently as July of this year. *See Three Affiliated Tribes v. Wold Engineering.* —U.S. —, 104 S.Ct. 2267 (1984).

Tribal jurisdiction over disputes such as this one is an essential aspect of the retained sovereign power of the Crow Tribe. "Included in this tribal power is a broad measure of civil jurisdiction over the activities of non-Indians on Indian Reservation lands in which the tribes have a significant interest." *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 152-153 (1980). *See also, Merrion v. Jicarilla Tribe of Apaches, supra,* 455 U.S. at 137, 147 n.13 (1982).

The interest of the Tribe in this particular matter is especially significant. Eighty-five percent of the students in the Lodge Grass School District are Crow Tribal members. The Lodge Grass school board consists of nine members of whom four are Crow Tribal members. *See supra* at 2. The Tribe also has a significant and legitimate interest in the health and safety of its children and in the standard of care exercised by those entrusted with the case and education of those children.

In *Washington v. Confederated Tribes of the Colville Indian Reservation, supra,* this Court determined that Indian Tribes are implicitly divested of certain sovereign

powers only where "the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government." 447 U.S. at 153. No overriding national interest conflicts with the exercise of tribal court jurisdiction in this case. The dispute is local in nature and should be resolved according to the doctrine of *lex loci deliciti,* which requires that the conduct of a tort feasor be judged in the local forum, according to local law and custom. *See e.g., Clark v. Circus-Circus,* 525 F.2d 1328, 1329 (9th Cir. 1975).

Moreover, the exercise of tribal court jurisdiction in this case is perfectly consistent with this Court's decision in *Montana v. United States, supra.* Under the *Montana* test, tribal jurisdicton over non-Indians is limited to situations in which non-Indians have entered into a consensual relationship with the tribe or the conduct of the non-Indians "threatens or has some direct effect on the poltical or economic security, or the health or welfare of the Tribe." *Montana v. United States, supra,* 450 U.S. at 65-66.[4] Sage's tort suit directly affects three vital interests of the Tribe: the health and welfare of its children; the quality of care and education provided to those children; and the maintenance of a forum for resolving disputes which arise on the reservation.

Thus, the underlying merits of petitioners' complaint do not warrant review. This Court has repeatedly recog-

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[4]The other case cited by Petitioners which limits tribal jurisdiction, *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978), was based on concern for the Constitutional rights of the criminal defendant, and is inapplicable to the issue of civil jurisdiction. *See Washington v. Confederated Tribes of the Colville Reservation, supra,* 447 U.S. at 153.

nized and affirmed the authority of tribes over reservation matters, particularly those matters in which the Tribe has a significant interest. In this case, the interest of the Tribe is especially vital, involving as it does the welfare of the Crow children. The exercise of such jurisdiction is also consistent with other lower court decisions, e.g., *Cardin v. De La Cruz,* 671 F.2d 363 (9th Cir. 1982), *cert. denied,* 459 U.S. 967 (1982); *Confederated Salish and Kootenai Tribes, etc. v. Namen,* 665 F.2d 951 (9th Cir. 1982); *cert. denied,* 459 U.S. 977 (1982); *Knight v. Shoshone and Arapahoe Tribes,* 670 F.2d 900 (10th Cir. 1982); *Means v. Wilson,* 522 F.2d 833 (8th Cir. 1975), *cert. denied* 424 U.S. 958 (1976); *McCurdy v. Steele,* 506 F.2d 653 (10th Cir. 1975). The petitioners have not pointed to any lower court decisions which support their position on the merits of their claim that the Crow Tribal Court lacks jurisdiction over Sage's suit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE CROW TRIBAL COURT
IN AND FOR THE CROW RESERVATION
CROW AGENCY, MONTANA

Civ. Case No. 82-287

LEROY SAGE, a minor by
FLORA NOT AFRAID, his guardian,

Plaintiff,

vs.

LODGE GRASS SCHOOL DISTRICT NO. 27,

Defendant.

MEMORANDUM and
ORDER

The Defendants, through their counsel, Jack Ramirez, appeared before this Court on August 22, 1984, and by special arrangements, filed a document entitled "SPECIAL APPEARANCE, PREEMPTORY MOTIONS, ANSWER, MOTION TO SET ASIDE DEFAULT, AND MOTION FOR TEMPORARY RESTRAINING ORDER". A hearing was scheduled to review these motions on less than one day's notice. Said motions were filed minutes before the hearing on August 22, 1984. The Plaintiff's attorney, Clarence Belue, was notified of these motions, and was present at the hearing. After reviewing the evidence presented and the arguments of the parties, the following is hereby entered.

MEMORANDUM AND ORDER

This case has a long history which is a matter of public record, and will not be set forth in this order, in the interests of getting this order out in a timely manner. A default judgment exists against the Defendants, and certain property has been seized to satisfy this judgment against them. Pursuant the applicable Rules of Civil Procedure of the Crow Tribal Code, this property was seized under a Writ of Execution issued by this Court on August 1, 1984. A sale of this property has been properly noticed and scheduled for August 23, 1984. Said Defendants' only filing in this case to date, filed August 22, 1984, is aimed at preventing the sale of this property.

Initially, this Court must review the documents which the Defendants have chosen to file. While this Court is willing and ready to review everything pertinent to this case, certain filings are simply inappropriate at this time, and will not be accepted or reviewed at this time. Specifically, an answer to the Plaintiff's original complaint is not reviewable, and is not valid until such time as the Defendant's have set aside the default judgment.

A motion for a Rule 22 Temporary Restraining Order would also appear to be improper at this time, as there is no action pending here for a permanent injunction. (See Generally, Rule 22(a)). It should be noted, that if such an action were brought, serious questions would arise about the issue of this case being res judicata. Attacking one case by bringing a completely separate proceeding would noramally be inappropriate.

The Defendants do have a basis for requesting injunctive relief under Rule 20(c). Injunctive relief may be granted for any of the following purposes:

1. To reduce an excessive seizure, if it can be shown that the value of the property seized exceeds the value of the seizing creditor's interest and the property is subject to division;

2. To prevent the seizure of exempt property;

3. To prevent the seizure if it be shown that some illegality has occurred in the proceedings prejudicial to the judgment creditor;

4. To prevent the seizure if it be shown that the judgment has been satisfied.

(See Rule 20(c), Crow Tribal Rules of Civil Procedure)

The Defendants, through testimony presented at the August 22, 1984 hearing, proved, to the satisfaction of this Court, that certain property seized did not belong to them. Specifically, it is this Court's finding that two sets of 16 inch tire chains and one eight (8) ton jack do not belong to the School District. These items were in the Blue Ford Club Cab pickup seized, and should be immediately returned to School District officials.

Additionally, it is this Court's finding that one (1) Epson FX-100 Printer, Serial No. 481667, and one (1) monitor, Serial No. 0057735, do not belong to the School District, and should be immediately returned to School District officials. These items to be returned shall be immediately identified and delivered to the School District so that they may deliver them into the possession of the rightful owners.

The School District also presented some testimony that two (2) Epson FX-100 printers, with the Serial Nos. 481710 and 481709, might well belong to the Federal government at this time, although eventually they will belong

to the School District. Further clarification on the ownership of these printers is needed, and the Defendants shall have one week from the date of this order to submit further evidence of the ownership of these printers. Said printers shall be held out of the scheduled August 23, 1984 sale, but if further satisfactory evidence of ownership is not received in one week, a sale of these items will be scheduled.

Testimony indicated that all other items currently scheduled to be sold on August 23, 1984, are the property of Lodge Grass School District No. 27. Superintendent Larry LaCounte affirmed that only the above-noted items belonged to someone other than the School District. He did note that the Blue Ford Club Cab pickup seized was used by the High School District, but acknowledged that official registered ownership was in Lodge Grass School District No. 27.

Essentially, the above-noted property which is to be returned can be classified as "exempt" property, and the Defendants have been granted relief as to that property—it will be returned. For the remaining property, except as noted, this Court finds that it is not exempt from seizure and sale at this time.

The Defendants have set forth reasons they feel warrant the setting aside of the default judgment in this case. Unfortunately, the Defendants have been lax in presenting their motion and arguments on this issue, and only now have come before this Court, the day before the scheduled sale of the seized property. They have raised substantial legal issues which this Court will not address without a full hearing, research, and briefs by counsel.

This Court will not issue an injunction to prevent this sale on the basis of Rule 20(c). When the above-mentioned property is returned, there appears to be no basis, after review of the evidence now before this Court, to issue a Rule 20(c) injunction. This Court has been presented with a difficult factual determination less than 24 hours before a scheduled sale of property which the parties were aware of for at least 2-3 weeks. Very little evidence was presented by the Defendants in support of their lengthy arguments. The Plaintiff had very little time to prepare to respond to the Defendants allegations. Nearly all of the factual allegations the Defendants cite in support of their Motion for a Temporary Restraining Order were provable in October or November of 1982. There appears to be no reasonable explanation as to why such evidence and arguments were not presented at an earlier time when they could have been further developed and considered.

The Defendants have placed themselves in this difficult situation, and have drawn the Plaintiff through protracted litigation with very little end in sight. After careful consideration, this Court holds that it will consider the Defendants Motion to Set Aside the Default Judgement, but will not enter a Temporary Restraining Order preventing the sale on August 23, 1984. Nevertheless, because of the importance of the allegations the Defendants are raising, this Court will stay the sale on August 23, 1984, until the Motion to Set Aside the Default Judgement has been decided, if the Defendants post a satisfactory surety bond in the amount of the appraised value of the items being held for sale. Said appraised value shall be reduced by the appraised value of the items herein ordered to be returned or held from this sale.

If the Defendants wish to stay any further execution processes in this Court on the basis of the Default judgement, they shall be required to post a satisfactory surety bond in the amount of the judgement remaining after the value of the sale items has been subtracted. Such a stay would be effective until the Motion to Set Aside the Default Judgement has been ruled upon.

The above-noted stays, while not specifically authorized by the Rules of Civil Procedure, are well within this Court's equitable powers to insure that justice is received in this case. They also fall within the guidelines of Rules 17 and 18 of the Crow Tribal Rules of Civil Procedure on Default Judgements and Stays of Proceedings to Enforce Judgements. While the Plaintiff certainly has the right to expect enforcement of the default judgement, the Defendants should have an opportunity to fully present their significant reasons for setting aside this default judgement.

The parties are hereby given notice that a hearing will be held on September 19, 1984, at 10:00 A.M., at the Crow Tribal Courthouse in Crow Agency, Montana, to review all pertinent evidence and arguments on the Defendant's Motion to Set Aside the Default Judgement. The attorneys of record are hereby directed to submit briefs on this matter prior to the above-noted hearing date. They shall file a stipulated briefing schedule for this issue within four working days of this order. After the hearing on this Motion, the parties will be given an opportunity to submit proposed orders.

WHEREFORE, IS IS HEREBY ORDERED that an order be entered consistent with the above. The sale of seized property scheduled in this case for August 23, 1984,

shall be held unless action is taken consistent with the above order.

ORDERED AND SIGNED THIS 22 DAY OF AUGUST, 1984.

/s/ Tommy E. Round Face
Judge, Crow Tribal Court

/s/ Melody K. Harris
Clerk, Crow Tribal Court

(SEAL)

CERTIFICATE

State of Montana)
Crow Tribal Court) ss.
Big Horn County)

I hereby certify that this sheet and all attached sheets identified by impression of my Official Seal, are each and all true and correct copies of originals filed in my office in Crow Tribal Ct. Case. No. CIV 82-287

Witness my hand and official seal this 23rd day of August, 1984.

/s/ Melody K. Harris
Clerk of Crow Tribal Court
Big Horn County, Montana

By .....
Deputy Clerk

IN THE CROW TRIBAL COURT
IN AND FOR THE CROW RESERVATION
CROW AGENCY, MONTANA

Civ. Case No. 82-287

LEROY SAGE, a minor, by
FLORA NOT AFRAID, his guardian,

Plaintiff

vs.

LODGE GRASS SCHOOL DISTRICT NO. 27,

Defendant.

SUPPLEMENTAL ORDER

This Court hereby supplements its order of August 22, 1984, as several significant events have taken place. The Defendants apparently have applied to the United States Supreme Court for an emergency recall of the Ninth Circuit mandate which directed the Montana Federal District Court to dissolve its injunction against enforcement of this Court's judgement.

Early this morning, this Court learned that Associate Justice William Rehnquist of the United States Supreme Court had, at least temporarily, granted the Defendant's application to withdraw the Ninth Circuit's mandate. This would apparently reinstate the Federal District Court's injunction against enforcement of the existing judgement in this case.

The effect of this action is not immediately apparent, as it would appear that the United States Supreme Court, in *Santa Clara Pueblo vs. Martinez,* 436 U.S. 39 (1978), has previously stated that federal courts lack the authority to review the actions of Tribes, and hence Tribal Courts. It is also most difficult to determine the full intent and effect of this order without reviewing it.

Nevertheless, this Court wants the Defendants to avail themselves of every possible opportunity to protect their interests, if they feel they have been wronged in some way. The Supreme Court, through Justice Rehnquist, apparently intends to somehow summarily review the processes of the Ninth Circuit Court of Appeals and the claims of

the Defendants. This Court will postpone the sale of the seized property in this case, pending the review the Supreme Court is now undertaking. It is this Court's understanding that this review will take at least until September 4, 1984.

THEREFORE, IT IS HEREBY ORDERED that the sale of property seized pursuant this Court's Writ of Execution dated August 1, 1984, is hereby postponed until further orders of this Court. The Plaintiff is hereby ordered to continue his measures insuring that this property is kept in a safe, secure place, pending further orders of this Court. The parties are hereby put on notice that the requirements of the order of August 22, 1984, remain in effect, except that the scheduled sale will not be held, and further execution processes will not be ordered until further orders of this Court, as noted above.

ORDERED AND SIGNED THIS 23rd DAY OF AUGUST, 1984.

/s/ Tommy E. Round Face
Judge, Crow Tribal Court

/s/ Brenda Yarlott
Clerk, Crow Tribal Court

(SEAL)

CERTIFICATE

State of Montana)
Crow Tribal Court) ss.
Big Horn County)

I hereby certify that this sheet and all attached sheets identified by impression of my Official Seal, are each and all true and correct copies of originals filed in my office in Crow Agency Case No. Civ 82-287.

Witness my hand and official seal this
23rd day of August, 1984.

Clerk of Crow Tribal Court
Big Horn County, Montana

By Brenda Yarlott
Deputy Clerk

IN THE CROW TRIBAL COURT
IN AND FOR THE CROW RESERVATION
CROW AGENCY, MONTANA

Civ. Case No. 82-287

LEROY SAGE, a minor, by
FLORA NOT AFRAID, his guardian,

Plaintiff,

vs.

LODGE GRASS SCHOOL DISTRICT NO. 27,

Defendant.

SUPPLEMENTAL ORDER

This Court hereby supplements it's orders of August 22, 1984, and August 23, 1984, to further clarify the action needed by the Defendants to protect their interests in this case. This order is being issued in recognition of the important issues in this case, potentially affecting the school children of Lodge Grass School District No. 27, so that said School District has a clear understanding of this Court's orders.

The judgement in this cause was for $153,010.00. As the Defendants noted at the hearing on August 22, 1984, it is reasonable to assume that interest will accrue on this amount from the date of judgement, until satisfaction. Indeed, this Court ordered that interest accrue against this judgement at the rate of ten (10) per cent per annum, until this judgement is satisfied. The Defendants have indicated that they intend to pursue remedies in the United States Supreme Court, and, in fact, the United States Supreme Court has taken tentative action in this case upon the application of the Defendants. Such review by the United States Supreme Court could delay final action in this case for yet another year.

In computing the interest on this judgement from October, 1982, through October, 1985, assuming this case will be settled by October, 1985, it appears that about $45,000 in interest will accrue. Additionally, it is reasonable to assume that the Defendants have incurred about $1000-$20000 in expenses in setting up the postponed sale, and in storing the seized items to date, as well as in maintaining them in storage. Therefore this Court fixes $200,000.00 as the total amount of the surety bond the Defendants must post to completely forestall further actions to execute upon this Court's judgement of October 25, 1982.

THEREFORE, IT IS HEREBY ORDERED that the Defendants, in order to gain the relief outlined by this Court in it's August 22, 1984 order, shall post a surety bond in the total amount of $200,000.00. This amount shall be posted in cash, in a form agreed to by stipulation of the Plaintiff, *or* in a form acceptable to

this Court after a hearing in which all parties have a right to appear and present their positions on this matter. Further clarification on this matter shall be initiated by the written motions of the inquiring party.

ORDERED AND SIGNED THIS 27th DAY OF AUGUST, 1984.

TOMMY E. ROUND FACE
Judge, Crow Tribal Court

MELODY K. HARRIS
(SEAL) Clerk, Crow Tribal Court

CERTIFICATE OF SERVICE

This is to certify that the above order was duly served on the attorneys of record at their addresses or address of record by first class postage prepaid on this 27th day of August, 1984, by:
Melody K. Harris

cc. Jack Ramirez
P.O. Box 2529
Billings, Mt. 59103

personally served on: Clarence Belue
215 W. Third
Hardin, Mt. 59034

File No. CV82-287

IN THE CROW TRIBAL COURT
IN AND FOR THE CROW RESERVATION
CROW AGENCY, MONTANA

Civ. Case No. 82-287

LEROY SAGE, a minor, by
FLORA NOT AFRAID, his guardian,
Plaintiff,

vs.

LODGE GRASS SCHOOL DISTRICT No. 27,
Defendant.

ORDER

In this Court's order of August 22, 1984, the parties in this case were directed to submit a stipulated briefing schedule outlining the time each would have to submit briefs on the Defendant's Motion to Set Aside the Default Judgement. At that time, a hearing was scheduled on September 19, 1984, so that the parties could have an opportunity to present evidence on this matter. This Court received nothing further from the parties relating to a briefing schedule, and therefore on September 6, 1984, this Court issued a supplemental order outlining a briefing schedule for the parties, and reaffirming the September 19, 1984 hearing date for 10:00 A.M., at the Crow Tribal Courthouse in Crow Agency, Montana. This hearing was held as scheduled. At the time of hearing, the Defendants had not filed a brief in support of their motion. The Plaintiff did file a brief in opposition of the motion prior to the hearing. The Plaintif, through his counsel, Clarence Belue, did appear, and present his arguments against the

motion. The Defendants did not appear, although they did call and note that they would not be appearing.

The Defendants were apparently under the mistaken impression that Judge James Battin's Order, reinstating his injunction against execution on the default judgment, somehow barred this Court from hearing a motion brought by the Defendants. Clearly, Judge Battin intended the Plaintiff in this action be enjoined from pursuing execution on the default judgment issued by this Court. In his Order of September 10, 1984, Judge Battin stated:

> " . . . . . and that the individual defendants Leroy Sage, a minor, his guardian, Flora Not Afraid, their counsel, the individual defendants named above, and anyone attempting to act on the basis of Crow Tribal Court civil case 82-287, *are enjoined from executing on any judgment or selling any property by execution or pressing any claim against the plaintiffs in the above-captioned case arising from the May 27, 1982, injury to Leroy Sage.*" (Emphasis added)
>
> (NOTE: Our Defendants were the Plaintiffs in federal court)

The hearing on this date, September 19, 1984, was to consider the motion filed by the Defendants. It was not for the purpose of " . . . . execution of pressing any claim against the plaintiffs . . . . . " The Defendants' motion was still before this Court on September 19, 1984. If they did not wish it to be consideerd, they could have withdrawn their motion, or asked that it's consideration be stayed for a later date. At the time of the hearing on September 19, this Court had received nothing from the Defendants on this motion, except for the original filing of the motion itself.

This hearing was scheduled for over a month. The Plaintiff prepared for this hearing, and was present. The Court received the Plaintiff's presentation, as it seemed grossly unfair to postpone the hearing and refuse the Plaintiff's arguments when the Defendants had filed nothing to request such action.

This Court stands ready now to rule on the merits of the Defendant's Motion to Set Aside the Default Judgement, based on the information received to date. Nevertheless, this Court wishes to give the Defendants every possible opportunity in this case, and therefore, a final ruling will not be entered on this motion until after this case has received it's final review before the United States Supreme Court.

THEREFORE, IT IS HEREBY ORDERED that the above findings be entered in this case. This Court will not enter judgement on the Defendants' Motion to Set Aside the Default Judgement until final review of this case by the United States Supreme Court. If the Defendants wish to file anything further in support of their motion, it shall be their responsibility to initiate such considerations.

ORDERED AND SIGNED THIS 19th DAY OF SEPTEMBER, 1984.

LONG E. ROUND FACE
Judge, Crow Tribal Court
MELODY K. HARRIS
(SEAL) Clerk, Crow Tribal Court

ORIGINAL

84-320

(19)

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IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
OCT 29 1984
ALEXANDER L. STEVAS
CLERK

October Term, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES;
and LODGE GRASS SCHOOL DISTRICT No. 27,

Petitioners,

v.

CROW TRIBE OF INDIANS; LEROY SAGE, a minor; FLORA NOT AFRAID, his guardian; THE CROW TRIBAL COURT OF THE CROW INDIAN RESERVATION; EDDIE ROUNDFACE, GLEN BIRDINGROUND, and IRA LEFT HAND, JUDGES of the Tribal Court of the Crow Indian Reservation; CROW INDIAN TRIBAL COUNCIL; and DONALD STEWART, Chairman of the Crow Indian Tribal Council,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CLARENCE T. BELUE
215 West Third Street
Hardin, Montana 59034

(406-665-1161)

29 pp

TABLE OF CONTENTS

Page

OPINIONS BELOW.....1

JURISDICTION.....2

QUESTIONS PRESENTED.....2

STATUTES, TREATIES AND OTHER LAWS INVOLVED.....2

STATEMENT OF THE CASE.....2

REASONS FOR DENYING THE WRIT.....3

I. THIS CASE RAISES NO QUESTION OF FEDERAL REVIEW OF INDIAN SOVEREIGNTY; THE CIRCUIT COURT MERELY FOUND NO FEDERAL JURISDICTION BECAUSE THE COMPLAINT FAILED TO STATE A FEDERAL CLAIM FOR RELIEF.....3

A. Congress Forbids Federal Injunctions Against Exercise of Jurisdiction By Tribal Courts.....4

B. The Petitioners Have Other Remedies Which They Refuse to Pursue.....6

C. The Petitioners Failed To Exhaust Tribal Remedies.....6

D. This Court Has The Power To Review Tribal Court Decisions.....8

E. The Petition Ought To Be Denied Pursuant To Rule 21.5.....13

F. A Federal District Court Is Not An Appellate Court Over Indian Courts.....13

II. THE COURT OF APPEALS CORRECTLY FOLLOWED THIS COURTS DECISION IN SANTA CLARA PUEBLO.....15

III. PETITIONER'S SECOND QUESTION PRESENT AS TO WHETHER THE TRIBAL COURT HAS JURISDICTION OF THIS ACTION, WAS INCORRECTLY DECIDED BY THE DISTRICT COURT BELOW.....15

A. The Law Is Settled That Tribes Retain Inherent Sovereign Power Over Civil Suits By Members Injured By The Conduct Of

TABLE OF AUTHORITIES

CASES: PAGE

Austin v. Searing, 16 N.Y. 112.....14

Durousseau v. U.S., 6 Cranch, 312.....9

Ex Parte, McKardle, 7 Wall. 506,512 (1869).....8,9

Fisher v. District Court,424 U.S. 382,386.....17,19

Gates v. Osborne 9 Wall, 967.....4

Lyon v. Department of Trade, 262 U.S. 77.....14

Marrion v. Jicarilla Apache Tribe, 455 U.S.130,148.....14,22

McClanahan v. State Tax Commission of Arizona, 411 U.S. 164(1973).....20

Montana v. United States, 450 U.S.544,566.....19

Montana Catholic Missions v. Missoula County, 200 U.S.118,128-129.....19

Moe v. Confederatd Salish and Kootani Tribes 425 U.S.463 (25 U.S.C. Sec. 1362).....6

More v. Pate, 39 F 2d. 616.....14

Nation v. Georgia 5 Pet.App. at 16-17.....17

Oliphant v. Squamish Indian Tribe, 435 U.S. 491,(Habeas Corpus under 25 U.S.C. Sec. 1303).....6,18

Santa Clara Pueblo v. Martinez,436 U.S. 49,71 (1978).....4,5,6,7,14,15,24

Stafford v. Superior Court,272 F 2d. 407.....14

Thomas v. Gay, 169 U.S.264,273.....19

U.S. v. Montana,450 U.S. 544 (1981)(Declaritory judgement under 28 U.S.C. Sec. 1345).....6,16,19

U.S. v. More, 3 Cranch 159,172,173 (1805).....8,9

New Mexico v. Mescalero Apache Tribe,1035 S. Ct.2378,2387.....17

U.S. v. Wheeler, 435 U.S. 313 (Cert to Federal Circuit Court to review a Federal Criminal Prosecution).....6,17

United States v. Kagma, 118,U.S. 375.....23

United States v. Mazurie, 419 U.S. 544,558.....16,17

Washington v. Confederated Tribes of The Collville Indian Reservation, 477 U.S. 134,166,167.....17,21

White Mountain Appache Tribe v. Brecker, 448 U.S. 136,151.....17

Williams v. Lee, 358 U.S.217 (Cert to Review The Arizona Supreme Court).....5,6,16,17,19,20

Wiscart v. Dauchy, 3 Dall 321,326 (1976).....9,10

Wooker v. Fedility Trust Co., 263 U.S. 413.....13

Three Affiliated Tribes of The Fort Berthold Reservation v. Wold Engineering 104 S Ct. 2267.....19

IN THE
SUPREME COURT OF THE UNITED STATES

October term, 1983

No. A-123 (84-320)

NATIONAL FARMERS UNION INSURANCE COMPANIES; LODGE GRASS SCHOOL DISTRICT NO. 27,

Petitioner,

vs.

CROW TRIBE OF INDIANS; LEROY SAGE, a minor; FLORA NOT AFRAID, his guardian; CROW INDIAN TRIBAL COUNCIL; EDDIE ROUNDFACE; GLEN BIRDINGROUND; IRA LEFT HAND; JUDGES OF THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; and DONALD STEWART; Chairman of the Crow Indian Tribal Council.

Respondents.

REPLY IN OPPOSITION TO PETITION FOR CERTIORARI

The respondents, Leroy Sage, a Minor, and Flora Not Afraid, his guardian, reply to the petition for writ of Certiorari to the United States Court of Appeals as follows:

OPINIONS BELOW

The opinion of United States District Court for the District of Montana is reported at 560 F. Supp. 213 (1983) and is reproduced in pages 14a-27a of Petitioners' Appendix ("Pet.App."). The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 736 F.2d 1320 (1984) and is reproduced at Pet. App. 1a-13a.

JURISDICTION

The judgement of the Court of Appeals was entered July 3, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) (1982).

QUESTIONS PRESENTED

1. Whether there is a federal claim for relief against Indian tribal governments that unlawfully assert civil jurisdiction over non-Indians.

2. Whether the Tribal Court of the Crow Indian Reservation has jurisdiction over claims that involve the State of Montana (or its subdivisions), that arise on State owned land, and that occur in connection with activities that are compelled or encouraged by State and Federal law or policy.

STATUTES, TREATIES AND OTHER LAWS INVOLVED

The issues of this case are determined by the authorities cited herein.

STATEMENT OF THE CASE

Respondents dispute Petitioner's statement of the case. The Circuit Court below best stated the facts as follows:

"In May of 1982, Leroy Sage, a minor, an enrolled member of the Crow Indian Tribe, was struck by a motorcycle while in the parking lot of Lodge Grass School District No. 27. The School District is located on land owned by the State of Montana and within the exterior

boundaries of the Crow Indian Reservation. Sage and his guardian, Flora Not Afraid, filed a negligence suit against the school district in Crow Tribal Court. Tribal process was served on the chairman of the school board, but the school district failed to answer Sage's complaint or to appear in tribal court to contest its jurisdiction. Sage ultimately obtained a default judgement against the school district. Upon receiving notice of the default judgement, the school district notified its insurer, National Farmers Union Insurance (National), of the tribal suit. Neither the school district nor National contested the default judgement in Crow Tribal Court, see Crow Tribal R. Civ. Proc. 17, or sought an appeal to the Crow Tribal Court of Appeals, See Crow Tribal Code Sec. 31-1-103; Crow Tribal R. App. Proc. 2. Instead, National obtained a temporary restraining order from a federal district court prohibiting Sage from enforcing his default judgement, and filed suit against the Crow Tribe, The Crow Tribal Council, the Crow Tribal Court, tribal judges and the chairman of the tribal council, seeking a permanent injunction. (Foot note omitted On December 29,1982, the district court entered a permanent injunction prohibiting Sage, Not Afraid, their counsel, the tribal judges and the chairman of the tribal council from executing on any judgement or pressing any claim against National or the school district arising from Sage's injury."

The Circuit Court reversed July 3,1984. Petitioners filed for Writ of Certiorari August 29,1984.

REASONS FOR DENYING THE WRIT

I. THIS CASE RAISES NO QUESTION OF FEDERAL REVIEW OF INDIAN SOVEREIGNTY; THE CIRCUIT COURT MERELY FOUND NO FEDERAL JURISDICTION BECAUSE THE

COMPLAINT FAILED TO STATE A FEDERAL CLAIM FOR RELIEF.

The petitioners suggest that if the Court of Appeals decision is left intact, the petitioners and others like them will be left without a forum. As will be shown below, the Circuit Court decision does not leave petitioners without remedies; nor can it be said that the ruling makes tribal courts the first and last arbitors of their own jurisdiction; it merely makes a correct finding that the petitioners have failed by their pleadings to invoke federal jurisdiction.

A. Congress Forbids Federal Injunctions Against Exercise of Jurisdiction Of Tribal Courts.

A Federal District Court has no jurisdiction except as authorized by a specific Act of Congress. U.S. Const., Art. III, Sec. 1.; Gates v. Osborne, 9 Wall, 967. Santa Clara Pueblo v. Martinez 436 U.S.49,71,(1978) concludes after an extensive review of hearings, committee reports, debate, etc., pertaining to the ICRA that, "Congress, aware of the intrusive effect of federal judicial review upon tribal self-government, intended to create only a limited mechanism for such review, namely, that provided for expressly in sec. 1303". 436 U.S. at 70. In reaching this conclusion, the Court took note of a number of factors indicating that its holding, contrary to the petitioner's contentions, (Pet.App.14) is not limited to a specific prohibition against federal actions to inforce the ICRA, but generally excludes causes of action in a federal district court as the means of obtaining a remedy against errors of the judgements of tribal courts. For example, the Court noted that Congress concluded

that federal review of tribal actions would undermine the authority of tribal forums. Santa Clara Pueblo Supra., at 59,64. Another reason Congress rejected federal review was because of the serious financial burdens it would place upon Indians,[1] Ibid, at 64,65.

Finally, the Santa Clara Pueblo decision found that tribal forums are appropriate for the exclusive adjudication of disputes effecting important personal and property rights of both indians and non-Indians.[2] Ibid. at 65.

The legislative history of Congress exhibits a clear intent on its part to balance the goal of preventing tribal injustices with the goal of avoiding interference into tribal affairs. It rejected a proposal that would have provided federal review de novo of tribal court actions. Ibid, at 67. Review by the Attorney General of the United States, and Review by the Bureau of Indian Affairs with subsequent appeal a federal district court was also rejected Ibid, at 68. If Congress intended to provide for federal review, it

---

1. Respondents Leroy Sage and his guardian, Flora Not Afraid (Sage) have filed affidavits with the Crow Tribal Court indicating that the cost of this litigation, as a result of the petitioners' dragging Sage to the Federal District Court, The Ninth Circuit Court of Appeals, and now to this Court, have cost Sage to the 19th. day of September, 1984, for attorneys fees and costs, the sum of $46,371.02. As Sage's motion for leave to proceed in forma pauperis states, Leroy Sage is a minor and Flora Not Afraid is his guardian. She and her husband are unemployed, and have no income.

2. Space and time do not allow development of the proposition that the tribal courts and the various Indian Tribes, since Williams v. Lee, 358 U.S. 217 (1959) and enactment of the ICRA of 1968 have almost universally enacted comprehensive enlightened and modern civil codes to adequately discharge the inherent sovereignty they posess over civil causes of action. The petition for Certiorari offers no proof that these tribal forums cannot or will not afford impartial and fair adjudication of the present controversy or any other civil controversy.

would have so legislated. The Santa Clara Pueblo decision was handed down in 1978 and was concluded with a statement inviting Congress to make clear its intention to permit intrusion on tribal sovereignty by review of such actions in a federal forum. Six years have passed, would have so legislated. The Santa Clara Pueblo decision was handed down in 1978 and was concluded with a statement inviting Congress to make clear its intention to permit intrusion on tribal sovereignty by review of such actions in a federal forum. Six years have passed, yet Congress has not yet seen fit to modify Santa Clara Pueblo.

B. The Petitioners Have Other Remedies Which They Refuse To Pursue.

The petitioners, without citing any authority, make a sweeping statement that there exists a long-standing federal judicial practice of affording federal review of exertions of tribal court jurisdiction over non-Indians. Pet.App. 8. This is simply not true. As noted by the Circuit Court below, cases extending federal review of the inherent powers of Indian sovereignty have relied upon other federal bases for federal jurisdiction. See U.S. v. Montana 450 U.S. 544 (1981) (Declaritory judgement under 28 USC sec. 1345), Oliphant v Suquamish Indian Tribe 435 U.S. 191 (Habeas Corpus under 25 USC sec. 1303). Other important Indian cases also demonstate. Williams vs. Lee 358 US 217 (Cert. to review The Arizona Supreme Court); Moe v. Confederated Salish and Kootani Tribes 425 U.S. 463 (25 USC sec. 1362); U.S. v. Wheeler 435 US 313 (Cert. to the Federal Circuit Court to reveiw a Federal Criminal Prosecution).

C. The Petitioners Failed to Exhaust Tribal Remedies.

As stated above, the Crow Tribal Judiciary, contrary to the contentions of the petitioner, affords ample means of litigating any claims petitioners might assert.[3] The Crow Tribal Code is comprehensive, clear, and modern. It's Code of Civil procedure is patterned after The Federal Rules of Civil Procedure. Title 7, establishes the Crow Court of Appeals which has jurisdiction to hear appeals of all civil cases of the Crow Tribal Court. In addition to failing and refusing to appear in the Tribal Court, the petitioners have refused to attempt to be heard by the Crow Court of Appeals.

The petitioners have suggested no valid reason for their refusal to seek redress from the Crow Tribal Court. The majority opinion in the Circuit Court below concluded it's decision by stating that the proper forum for the determination of this controversy "at least in the first instance is not a federal court, but a tribal court". Pet. App. at 7a. The dissent is more specific adding:

> "Second, requiring exhaustion here would strengthen the Tribal Court System. The plaintiffs ignored that system and instead attempted to circumvent it by suing immediately in Federal Court. Such disrespect for tribal institutions should be discouraged." (Pet App. at 13 a.)

Santa Clara Pueblo, Supra, at 65,66, specifically found that tribal forums are appropriate for exclusive adjudication of disputes affecting important personal and property interests of both Indian and non-Indians.

---

3. The petitioner's brief at page 4 states that had they gone to the Crow Tribal Court, they might have waived person and subject matter jurisdiction objections. This is not correct. Rule 7, Crow Civil Code of procedure (CCCP) specifically allows an appearance to object to subject matter, jurisdiction and personal jurisdiction and will not submit themselves to the jurisdiction of the court.

D. This Court Has The Power To Review Tribal Court Decisions.

Another avenue for review open to the petitioners is resort to this Court. The Constitution, Article III, Section 2, provides in part:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority;.....
>
> In all cases effecting embassadors, other public ministers and consuls and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulation as the Congress shall make."

The appellate power of this Court is derived from the Constitution its self, not acts of Congress. Ex Parte, McKardle, 7 Wall.506, 512 (1869).

Apparently, this court has never decided whether, in the absence of Congressional regulation, it can exercise appellate power, because among the earliest Acts of the First Congress, at it's first session in September of 1789, Congress provided the first regulation of this Courts appellate review of federal questions arising in Indian Courts. The question has mostly laid dormant since then. Chief Justice Marshall speaking in the case of U.S. v. More, 3 Cranch 159,172,173 (1805), observed as follows:

> ".....the Attorney General ... seems to argue that... the Supreme Court possessed appellate jurisdiction... over the judgements of every court, whose decision it would review, unless there should be some exception or regulation made by Congress, which should circumscribe the jurisdiction conferred by the Constitution.

> This argument would be unanswerable if the Supreme Court had been created by a law, without describing it's jurisdiction the Constitution would have been the only standard by which it's powers could be tested, since there would be clearly no Congressional Regulation or exception on the subject.

In More, Justice Marshall dismissed an appeal arising from the Circuit Court of the District of Columbia because he interpreted the regulating act of Congress to exclude appeal to the Supreme Court. But, what if no exception or regulation of Congress existed? Such is the case with regard to the appeal of Indian decisions.

The McKardle case, Supra, at 513, demonstrates the assumptions that have been made over the years in the absence of a clear case where congress has not regulated. Justice Chase, speaking for court said:

> "The source of that jurisdiction, and the limitations of it by the Constitution and by the stature, have been on several occasions subjects of consideration here. In the case of Durousseau v U.S. 6 Cranch, 312;Wiscart v. Dauchy, 3 Dall. 321, particularly, the whole matter was carefully examined, and the court held, that while "the appellate powers of this court are not given by the Judicial Act, but are given by the Constitution; "they are nevertheless, 'limited and regulated by that Act, and by such other Acts as have been passed on the subject.' The court said, further, that the Judicial Act was an exercise of the power given by the Constitution to Congress "of making exceptions to the appellate jurisdiction of the Supreme Court."
>
> "They have described affirmatively," said the court,"it's jurisdiction, and this affirmative description has been understood to imply a negatation of the exercise of such appellate power as is not comprehended within it."
>
> The principle is the affirmation of appellate jurisdiction implies the

> negation of all such jurisdiction not affirmed having been thus established, it was an almost necessary consequence that Acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as Acts granting jurisdiction, and not as Acts making exceptions to the constitutional grant of it.

But, as noted above, the precise question of the scope of this courts appellate power, in the absence of congressional exceptions or regulations, has never been fully answered. In the case of Wiscart v. Dauchy, 3 Dall. 321, 326 (1796), the dissenting opinion of Justice Wilson contended that the governing Act of Congress then regulating this court's appellate jurisdiction had failed to regulate on the subject of review of certain cases, and that therefore, appeal could be had by resort to the authority granted in the Constitution it self. He said:

> "The Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations at the Congress shall make." The appellate jurisdiction, there flowed, as a consequence, from this source; nor had the legislature any occasion to do, what the constitution had already done. The legislature might, indeed, have made exceptions, and introduced regulations upon the subject; but as it has not done so, the case remains upon the strong ground of the constitution, which in general terms, and on general principles, provides and authorizes an appeal."

However, the majority opinion in that case made a straight forward statement that, "If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdication; and if the rule is provided, we cannot depart from it." Ibid at 327. But

the Wiscart case did envolve an interpretation of an existing act regulating the appellate jurisdiction of this court. Hence, there does not appear to be a decision regarding the scope of the appellate power in the absence of congressional regulation.

A closer look at the Constitutional provision lends credance to the argument that exercise of the appellate power in the absence of regulation, was contemplated by the framers. The qualifying word used in connection with the regulatory power of Congress is the word, "with". The way the term is used in the sentence indicates that it is used in the sense of indicating a combination, joinder, or addition to, but not to the exclusion of it's antecedent, the appellate power. This is demonstrated by considering that if the framers had intended to exclude exercise of appellate jurisdiction in the absence of Congressional regulation, they could have easily done so by using words such as "only with", or "when with", or "if with", instead of "with".

In addition, it ought to be noted that the primary purpose of section 2 was to define the judicial power, including the appellate power. It seems that, if the framers intended to make Congressional regulation a prerequisite to the exercise of the appellate power, they would have given the mention of regulation a more prominent place in the clause.

Finally, a very well reasoned law review article construing the appellate power of this Court concludes that the power of Congress to except and regulate the appellate power cannot be construed so as to give Congress the power to preclude Supreme Court review. 109 V.Pa.L.Rev. 157. It would seem to follow that in

the absence of exception and regulation, this Court, likewise, is not precluded from excercising the power of appellate reveiw.

Appellate review of Indian Court decisions falls in this category. There is no act of Congress on the subject. It is respectfully submitted that, in the absence of an Act of Congress this, Court may in a appropriate case review Indian court decisions.

Exercise of the appellate power of this court will afford proper and orderly appellate review of tribal court decisions of Federal questions apd at the same time will avoid the harsh remedy the petitioners attempted by obtaining ex parte, an injunction from a federal district court.

It is assumed that this Court will, until and in absence of Congressional regulation, formulate its own rules for exercise of this appellate power. Any such procedural rules ought to require an exhaustion of tribal remedies before this Court reviews. The petitioners, have not exhaused tribal remedies and ought not to be afforded any relief by this Court until they do so. Thus, Certiorari, should not, at least at this time, be granted.

This exhaustion requirement is demonstrated by a comparison to the rules for review of State court decisions. 28 USC sec. 1257 sets forth the rule for review of State decisions. It Requires that this Court review only decisions of "the highest court of a state." Comity calls for similar rules for review of Indian decisions. Therefore, as stated before, this controversy is not now ripe for review.

Respect for Indian self-government,further supports the argument. The petitioners have deliberate-

ly, strategically, and disrespectfully refused to obtain reviewed by the processes of the tribal court system.

E. The Petition Ought To Be Denied Pursuant To Rule 21.5.

As stated above, the petition herein makes the sweeping statement that this case presents important and frequently reoccuring questions regarding Federal Review of Indian Tribal Sovereignty. However, analysis herein shows that the the Circuit Court decision merely interpreted jurisdictional statutes; It does not necessarily deny all federal review. Other remedies are available. The petition simply does not show that the question presented is a frequently re-occuring question. For these reasons alone, it is requested that petition be denied pursuant to rule 21.5, of the rules of this Court.

F. A Federal District Court Is Not An Appellate Court Over indian Courts

The Circuit Court is rightfully concerned over a complaint in Federal District Court for injunctive relief against a Tribal Court which is attempting to exercise adjudicatory civil jurisdiction. The impact of a federal injunction against a tribal court issued ex parte is humiliating, extraordinary, and harsh. The practical effect of the petitioner's attempt to invoke federal jurisdiction is to obtain appellate review by the federal district court. As stated above, federal courts have only the jurisdiction Congress grants them.

Furthermore, A Federal District Court is not an Appellate Court, Wooker v. Fedility Trust Company 263 U.S. 413. A federal district court has no jurisdiction to review a state court judgement; such action would be

a collerateral attack upon the state court's judgements; the proper method for review is appeal; lower federal Courts are not superior to state courts. Lyon v. Department of trade, 262 U.S. 77. Even if a state court acts without jurisdiction, its determination is not subject to collateral attack by the federal district court. The proper remedy is by appeal within the state court system. More v. Pate 39 F. 2d 616.

The federal court has no jurisdiction under 28 USC sec. 1331 to review a state courts' decision on Constitutional issues, Stafford v. Superior Court, 272 F2d. 407. A specific statute, 28 USC sec. 2283, specifically forbids federal courts from enjoining state proceedings, except under circumstances requiring federal intervention to protect federal jurisdiction.

There appears to be no reasonable basis why the above principles and laws forbidding federal intrusion into state court proceedings should not also be applied to tribal court proceedings. A Tribal Court acts with inherent sovereign power to the extent federal law allows. It retains all inherent attributes of soverignty not devested by the federal government. Marrion v. Jicarilla Apache Tribe 455 U.S. 130,148. One of the functions of sovereignty is to establish a judicial tribunal. Austin v. Searing,16 N.Y. 112. The soverign Indian tribes have not only established tribal court systems, but they have done so with express federal congressional recognition and encouragement. Santa Clara Pueblo v. Martines, 436 U.S. 49,71; 25 U.S. sec. 1202, 25 USC sec. 1902. At the same time that Congress encouraged and recognized this tribal civil jurisdiction, it specifically and intentionally limited

federal distict court review. Santa Clara Pueblo v. Martinez, 436 U.S. 49,71.

If a tribal court acts as a sovereign in discharging its legitimate civil adjudicatory authority, there appears to be no valid reason why its exercise of jurisdiction ought to be any more vulnerable to collateral federal attack than are the courts of the various states.

As stated above, the proceedure for appellate review is to first go to the Crow Court of Appeals. In the absence of appropriate Congressional regulation, further appeal of federal questions could be reviewed by this Court under it's appellate power. Until the petitioners seek appropriate appellate review of the Tribal Court's decisions by appropriate proceedure, they ought not to receive relief from this Court, or any federal court.

II. THE COURT OF APPEALS CORRECTLY FOLLOWED THIS COURTS DECISION IN SANTA CLARA PUEBLO.

Contrary to the contentions of the petitioners, and as set forth above, Santa Clara Pueblo, Supra, at 65,66 is not limited to it's facts. The decision holds generally that Congress has forbidden federal court intrusion into the exercise of the legitimate authority of Indian courts.

The petitioners give no adequate support for their general characterization of Santa Clara Pueblo. Under rule 21.5, no basis for granting certiorari appears in their petition.

III. PETITIONER'S SECOND QUESTION PRESENTED AS TO WHETHER THE TRIBAL COURT HAS JURISDICTION OF THIS ACTION, WAS INCORRECTLY DECIDED BY THE DISTRICT COURT BELOW.

The petitioners suggest in their petition that one of the questions presented by their this case is whether a tribal court has civil jurisdiction over claims against a subdivision of a State or other persons compelled or encouraged by state or federal law or policy to provide services on a reservation. The petitioners present no support for their views on this question. We respectfully submit that the petition ought to be denied pursuant to rule 21.5. However, because this question is at the heart of this whole controversy, and was incorrectly decided by the District Court, it seems appropriate to outline the law pertinent to this question.

A. The Law Is Settled That Tribes Retain Inherent Sovereign Power Over Civil Suits By Members Injured By The Conduct Of Non-Indians While Inside The Reservation.

"To be sure, Indian Tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." The United States v. Montana 450 U.S. 544,565. This inherent soverign power is stated by the principle case in this area, Williams v. Lee 358 U.S. 217, as the power of "reservation Indians to make their own laws and be governed by them". Ibid, 358 U.S. at 220.

Exercise of this inherent Indian soverignty power excludes state court jurisdiction Ibid. This power extends over non-Indians because the basis of the power is not the status of the defendant, but, (1) his presence on the reservation, Williams v. Lee 358 U.S. at p. 217,223, United States v. Mazurie, 419 U.S. 544,558,

and, (2) his conduct therein. Williams v. Lee, Ibid United States v. Mazurie, Ibid; Washington v. Confederated Tribes of The Coleville Indian Reservation, 447 U.S. 134,166,167; Fisher v. District Court, 424 U.S. 382,386.

The power of the Indian court is territorial, it is not as to persons only. United States v. Wheeler 435 U.S. 313 (Cert. to the Federal Circuit Court, review Federal Criminal prosecution), p 313. United States v. Mazurie 419 U.S. 544,at 557. Cherokee Nation v. Georgia, 5 Pet App at 16-17. New Mexico v. Mescalero Apache Tribe 103 S.Ct. 2378,2387, White Mountain Apache Tribe v. Brecker, 448 U.S. 136, 151.

On June 1, 1868, General William T. Sherman, for the United States executed a Treaty with the heads of The Navajo Nation. 15 Stat. 667. In Williams v. Lee, Supra, at 221, this court stated that implicit in the treaty terms was the understanding that the internal affairs of tne indians remained exclusively within the jurisdiction of what ever tribal government existed. May 7, 1868, less than one month before the Treaty with the Navajos, General Sherman also executed a Treaty with the Crows which is identical in it's provisions regarding internal affairs as that of the Navajo. 15 Stat. 649. It would appear that the Crows are entitled to the same exclusive jurisdiction.

Congressional Acts support Indian self government. A number of Congressional Acts specifically grant civil and criminal authority to various states. See 25 USC sec. 232.233. 18 USC sec.1162, 28 USC 1360, (Granting civil and criminal jurisdiction to the States of New York, California, Minnesota, Nebraska, Oregon, and

Wisconsin). The Indian Civil Rights Act of 1968 is especially instructive as to Congressional intent with regard to civil jurisdiction of the tribal courts. Sec. 1322, sets the conditions for assumption of state jurisdiction over Indian civil matters. It describes civil causes of action "between Indians, or to which Indians are parties". It seems reasonable to assume that without the assumption of jurisdiction by the various states, including Montana, that Indian Courts have exclusive jurisdiction over civil causes of action to which Indians are parties.

The decisions of this court have recognized only two limitations upon inherent Indian sovereignty over civil actions involving non-Indians. The first is a matter involving an over-riding federal interest. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191. This case found an over-riding federal interest, the liberty of citizens generally, which acted as a federal limit on inherent Indian soverignty in criminal matters. Thus, tribal courts have no criminal jurisdiction over non-Indians. This over-riding federal interest is not involved in civil matters. Loss of Liberty is not at stake; the judgement results in compensation or adjustment of personal rights and obligations between litigants. Furthermore, unlike criminal actions where the central government is the complaining party, a civil action involves private plaintiffs. Thus, there is less need to assert over-riding federal protection of the citizenry from abuses of the power of the tribal government as there is in criminal cases.

Another consideration is important. Conflicts of law principles calls for a forum between private litigants where the tort was committed. This principle

gains added meaning considering the principles of Indian self-government which call for a forum familiar with and prone to apply to local Indian laws, traditions, customs, and even the Indian Language.

The second limit on inherent Indian soverignty was most recently articulated in Montana v. United States, 450 U.S. 544,566,wherein the court stated:

> "A Tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within it's reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. See Fisher v. District Court 424 U.S. 382,386, Williams v. Lee Supra. at 220, Montana Catholic Missions v. Missoula County, 200 U.S. 118, 128-129; Thomas v. Gay, 169 U.S. 264,273.

The District court below, in error, concluded that the general rule in Montana does not apply to this case because the injury to Leroy Sage is an injury to an individual, and, therefore, does not effect the health and welfare of the Crow Tribe.[4]

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4. The Honorable James F. Battin, stated, "As those familiar with Indian Law are aware, the law changes rapidly in this area. An old case is old law." Pet. App. at 23. Judge Battin referred to Williams v. Lee in making this statement. The latest case in the field of Indian law, handed down by this Court, Three Affiliated Tribes of The Fort Berthold Reservation v. Wold Engineering. 104 S Ct. 2267 (Decided May 29,1984) cites Williams v. Lee no less than seven times, all with specific approval of the holding therein. The case of U.S. v. Montana, Supra, relied upon exclusively by Judge Battin for his holding cites Williams v. Lee at lease three times, all with approval. The very rule adopted by Judge Battin (U.S. v. Montana) cites Williams v. Lee as the source for the rule.

This reasoning is fallacious for a number of reasons. First, the tribe has a substantial interest in protecting the health and welfare of it's individual members. Its organization, including the courts, exist for no other purpose. Second, the tribe has an interest in compensating it's members adequately for wrongs occasioned by the conduct of persons inside the reservation. Third, it has an interest in providing a forum for it's members to adjudicate controversies. Finally, it has an interest in detering tortious conduct by persons inside the reservation whose conduct is offensive and injurious.

The ruling of Judge Battin, below that an injury to an individual is not injury to the tribe, was laid to rest and rejected in McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973). This case involved an action by a Navajo Indian against the State Tax Commission of Arizona for refund of State income taxes paid. The State of Arizona argued that because the tax was levied against the individual Indian, that there was no infringement against the tribe as a whole or, the court in rejecting this argument stated:

> "Finally, we cannot accept the notion that it, is irrelevent, whether the State Income Tax infringes on 'appellants' rights as an individual Navajo Indian as the State Court of Appeals maintains."
> To be sure, when congress has legislated on Indian matters, it has, most often, delt with the tribes as collective entities. But those entities are, after all, composed of individual indians, and the legislation confers individual rights. This court has therefore held that the "question has always been whether the state action infringed on the right of reservation indians, to make their own laws and be ruled by them." Williams v. Lee, Supra, at 220 of

> 358 U.S. In this case, appellants rights, as a reservation indian, were violated when the state collected a tax from her which it had no jurisdiction to impose. Accordingly, the judgement of the court below must be reversed." (411 U.S. at 181).

As stated above, the petitioner raises the question of the scope of tribal court jurisdiction over civil controversies involving non-Indian defendants, but offers no authority for the proposition that this question ought to be heard and decided by this court under the circumstances presented by this case. It is, therefore, respectfully requested that the application for Certiorari be denied pursuant to rule 21.5.

B. Tribal Sovereignty Over Civil Causes Of Action Against Non-Indians Is Not Diminished Because Of Any Special State Of The Particular Non-Indian Defendant.

The petitioners suggest that entities obligated by law or policy to furnish services to Indians on the reservation ought to be afforded some kind of exemption or immunity from the civil jurisdiction of the Tribal Court. However, the petitioners do not develop this argument in any manner whatsoever, and, therefore, they are not entitled to review by Certiorari because of their failure to support this suggestion. Rule 21.5.

However, it seems appropriate, in spite of the petitioners failure to speak to this issue, that this reply addresses the subject.

"Inherent Indian Sovereignty is dependent on, and subordinate to only the Federal Government, not the States." Washington v. Confederated Tribes of Colevil-le, 447 U.S. 134,154. "It must be remembered that Indian soverignty is not conditioned on the assent of a

non-member; to the contrary, the non-members presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose."(emphasis supplied) Marrion v. Jicarilla Apache Tribe 455 U.S. 130, 147. "What ever place consent may have in contractial matters and in the creation of democratic governments. it has little if any role in measuring the validity of an exercise of ligitimate soverign authority. Requiring the consent of the entrant, deposits in the hands of the excludable non-Indian, the source of the tribe's power, when the power instead derives from soverignty itself. Only the Federal Government may limit a tribe's exercise of it's soverign authority." Ibid. at 147.

Furthermore, the petitioners have shown no authority for the proposition that they, or others like them, are present on the reservation by some force of law or policy. It has not been shown that the Lodge Grass School, by force of either state or federal law had to be built inside the Crow Reservation. Its location is a geographical convenience to those attending school. It was built there by choice, not by order of law or policy.

The organic act of the State of Montana, 13 Stat 85, and the Enabling Act, 25 Stat 676, placed conditions upon statehood. The enabling act states in part:

> "The people inhabiting said proposed states do agree and declare that they forever disclaim all right entitled to the unappropriated public lands lying within boundaries thereof and to all lands lying within said limits owned or held by an Indian or Indian Tribe; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands

> shall remain under the absolute jurisdiction and control of the Congress of the United States.

As stated in the case of United States v. Kagama, 118 U.S. 375, the Indians "owe no alligance to the states, and receive from them no protection. Because of the local ill-feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing from the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power." 118 U.S. at 384. A bibliography of Indian cases coming before this court would, for the most part, substantiate a longstanding conflict between state and tribal authorities. If anything, the presence of state authorities, agencies, or institutions inside the reservation calls for a greater affirmation of Indian Sovereignty, instead of some state immunity as appearantly claimed here.

Between the lines of the petition herein seems an imlied argument that tribal forums will, somehow, deny the petitioner and others like them, of a fair and impartial adjudication. This is not true. Most importantly, it is not demonstrated. If the petitioners found themselves the subject of a tort lawsuit arising from their conduct within the State of Wyoming, or Idaho, they would never dream of restraining courts of those states from exercising their legitimate jurisdiction. Even if they assert that the State courts are without jurisdiction, and acting in flagrant abuse of their power, and in violation of federal law, the proper remedy would be by appeal to the appellate courts of the respective states. Only after exhausting State appeals

could they seek federal review. The principles of Law considered here require that the tribal court system be afforded no less consideration and respect. They act as sovereigns too; as sovereigns they deserve the respect ordinarily afforded. Until petitioners pursue tribal remedies, this Court ought to deny their petitions.

CONCLUSION

The Circuit Court decision does not leave petitioners without a forum or a remedy. It merely recognizes the limits Congress has placed upon review of Indian Court decisions by a federal district court. Petitioners refuse to pursue tribal remedies available. Other remedies are available. The Circuit Court has followed Santa Clara Pueblo. The petition should be denied.

Respectfully Submitted this 26th. day of October, 1984.

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CERTIFICATE OF SERVICE

I, Clarence T. Belue, a member of the bar of this court, hereby certify pursuant to Rule 20 of the rules of this court, that counsel listed below have been served with copies of the foregoing Reply in Opposition to Petition for Certiorari this date by 1st. class mail,

postage prepaid. I also certify that, to the extent known, all parties required to be notified and served have been served.

Dated this 26th. day of October, 1984.

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Office-Supreme Court, U.S.
FILED
OCT 27 1984
ALEXANDER L. STEVAS,
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NO. 84-320

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES; and LODGE GRASS SCHOOL DISTRICT NO. 27,

Petitioners,

-v-

CROW TRIBE OF INDIANS: LEROY SAGE, a minor; FLORA NOT AFRAID, his guardian; THE TRIBAL COURT OF THE CROW INDIAN RESERVATION: EDDIE ROUNDFACE, GLEN BIRDINGROUND, and IRA LEFT HAND, Judges of the Tribal Court of the Crow Indian Reservation; CROW INDIAN TRIBAL COUNCIL; and DONALD STUART, Chairman of the Crow Indian Tribal Council,

Respondents.

BRIEF OF NINE AMICI CURIAE STATES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED BY THE PETITION FOR WRIT OF CERTIORARI

1. Whether there is a federal claim for relief against Indian tribal governments that unlawfully assert civil jurisdiction over non-Indians.

2. Whether the Tribal Court of the Crow Indian Reservation has jurisdiction over claims that involve the State of Montana (or its subdivisions), that arise on state-owned land, and that occur in connection with activities that are compelled or encouraged by state and federal law or policy.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
STATEMENT OF INTEREST.....	1
ARGUMENT.....	5
I. THE CIVIL ADJUDICATORY JURISDICTION OF INDIAN TRIBES IS A MATTER OF GREAT IMPORTANCE TO THE AMICI STATES WHICH HAVE SUBSTANTIAL GOVERNMENTAL RELATIONSHIPS WITH TRIBAL MEMBERS AND THE TRIBES THEMSELVES.....	4
II. THE SCOPE OF TRIBAL SOVEREIGNTY HAS TRADITIONALLY BEEN A MATTER DETERMINED WITH REFERENCE TO FEDERAL PRINCIPLES. A FEDERAL FORUM IS THEREFORE ESSENTIAL TO ESTABLISHING A CONSISTENT APPLICATION OF SOVEREIGNTY PRINCIPLES WITH RESPECT TO THE PERMISSIBLE RANGE OF TRIBAL CIVIL ADJUDICATORY JURISDICTION..	11
CONCLUSION.....	19

TABLE OF AUTHORITIES

Page

CASES:

Babbit Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983), cert. denied, 104 S. Ct. 1707 (1984) 18

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City of Milwaukee v. Illinois, 451 U.S. 304 (1981) 12

Ex parte Crow Dog, 109 U.S. 556 (1883) 17

Fisher v. District Court, 424 U.S. 382 (1976) 16

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 16

Montana v. United States, 450 U.S. 544 (1981) 16

New Mexico v. Mescalero Apache Tribe, 103 S. Ct. 2378 (1983) 16

TABLE OF AUTHORITIES
(Cont.)

Page

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 17

Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) 14

Oneida Indian Nation v. County of Oneida, 719 F.2d 525 (2d Cir. 1983), cert. granted, 104 S. Ct. 1590 (1984) 14

Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832 (1982) 7

Rice v. Rehner, 103 S. Ct. 3291 (1983) 16

Texas Industries v. Radcliffe Materials, 451 U.S. 630 (1981) 13

United States v. Harvey, 701 F.2d 800 (9th Cir. 1983) 8

United States v. Oklahoma Gas & Electric Co., 318 U.S. 206 (1943) 8

United States v. Wheeler, 435 U.S. 313 (1978) 17,18

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 14

TABLE OF AUTHORITIES
(Cont.)

	Page
Williams v. Lee, 358 U.S. 217 (1958).....	16
Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)...	14

OTHER AUTHORITIES

American Indians, American Justice, V. Deloria & C. Lytle (1983).....	2
Code of Federal Regulations	
25 C.F.R. 11.1(d) (1984).....	2
25 C.F.R. 169.5(a).....	8
25 C.F.R. 169.28.....	8
Cohen's Handbook of Federal Indian Law, R. Strickland, 251 (1982 ed.).....	2
Crow Allotment Act of 1920, Pub. L. No. 66-230, § 16, 41 Stat. 751.....	4
Public Law	
Pub. L. No. 83-280, § 6, 67 Stat. 588 (1953).....	1
Pub. L. No. 63-310, 38 Stat. 1188 (1915).....	7,8
Supreme Court of United States Rules	
Rule 36.4.....	1

TABLE OF AUTHORITIES

(Continued)

	Page
United States Code	
18 U.S.C. § 1162 (1966).....	8
25 U.S.C. § 331 (1983).....	8
25 U.S.C. § 1322(a) (1983)....	2
28 U.S.C. § 1331 (1966).....4,12	

NO. 84-320

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES; and LODGE GRASS SCHOOL DISTRICT NO. 27,

Petitioners,

-v-

CROW TRIBE OF INDIANS: LEROY SAGE, a minor; FLORA NOT AFRAID, his guardian; THE TRIBAL COURT OF THE CROW INDIAN RESERVATION: EDDIE ROUNDFACE, GLEN BIRDINGROUND, and IRA LEFT HAND, Judges of the Tribal Court of the Crow Indian Reservation; CROW INDIAN TRIBAL COUNCIL; and DONALD STUART, Chairman of the Crow Indian Tribal Council,

Respondents.

BRIEF OF NINE AMICI CURIAE STATES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The states of Arizona, Montana, Minnesota, North Carolina, North Dakota, Oklahoma, South Dakota, Wisconsin and Wyoming as amici curiae respectfully submit a brief in support of the Petition for Writ of Certiorari in this matter.

STATEMENT OF INTEREST

The amici curiae states appear through their respective attorneys general. See Sup. Ct. R. 36.4. Each amicus state has at least one and, in most instances, several Indian reservations within its boundaries. With the exception of Minnesota and Wisconsin, none has been granted civil jurisdiction over such reservations under 25 U.S.C. § 1322(a) (1983) or previously assumed such jurisdiction under section 6 of

Public Law No. 83-280, 67 Stat. 588, 590 (1953). In all amici states except North Carolina and Wyoming, tribes have developed their own adjudicatory systems which have superseded Courts of Indian Offenses, apply tribal codes and common law and are generally administered by lay judges. See generally R. Strickland, Cohen's Handbook of Federal Indian Law 251 (1982 ed.); V. Deloria & C. Lytle, American Indians, American Justice 116-25 (1983); 25 C.F.R. § 11.1(d) (1984).

Although the Indian reservations within the amici states have many incidents of self-government, there is necessarily a substantial degree of interchange within exterior reservation boundaries between the states, tribes and tribal members. Such interchange occurs on fee lands owned by the state or nontribal members and on lands owned in

fee by tribal members or held in trust for the tribe by the United States government; the interchange normally arises from the performance of uniquely governmental functions, such as provision of educational or social services and the construction, maintenance and regulation of highways. The degree of interaction between the amici states, or their political subdivisions, and the tribes is clearly greater than that of any other person except the federal government. Concomitant with such interchange is, as in this case, an increased opportunity for involuntary involvement in tribal civil adjudicatory proceedings.

Protection of the amici states' varied interests requires the availability of a federal forum to determine whether the exercise of tribal civil adjudication jurisdiction has

exceeded the scope of the tribe's federally-defined sovereignty rights. Ready access to such a forum exists only if original jurisdiction before United States district courts is present under 28 U.S.C. § 1331 (1966). This brief will thus be limited to discussion of the first question presented by the petition for writ of certiorari herein.

ARGUMENT

I. THE CIVIL ADJUDICATORY JURISDICTION OF INDIAN TRIBES IS A MATTER OF GREAT IMPORTANCE TO THE AMICI STATES WHICH HAVE SUBSTANTIAL GOVERNMENTAL RELATIONSHIPS WITH TRIBAL MEMBERS AND THE TRIBES THEMSELVES.

Under section 16 of the Crow Allotment Act of 1920, Pub. L. No. 66-230, § 16, 41 Stat. 751, 756-57, the State of Montana was granted land within the Crow Reservation for "common school purposes;" the grant was in fee and on the condition that tribal youth "be permitted to attend the public schools of

[Montana] on the same condition as children of white citizens of said state." The facility in question presently is located on such land. Petitioner Lodge Grass School District No. 27 is, however, only one of 26 Montana school districts which have elementary or secondary schools on state-owned land within the exterior boundaries of the seven reservations in that state.[1/] These facilities provide

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[1/] See, e.g., Pub. L. No. 59-154, 34 Stat. 1015, 1036 (1907) (grant of lands on Blackfeet Reservation to Montana for school purposes); Pub. L. No. 65-159, 40 Stat. 561, 574 (1918) (conveyance of land at Bighorn, Montana on Crow Reservation to Montana for school purposes on condition that Indian children within district be permitted to attend school on equal basis with white children); Pub. L. No. 66-375, § 7, 41 Stat. 1355, 1359 (1921) (grant of land to Montana for school purposes on Fort Belknap Reservation); Pub. L. No. 66-169, 41 Stat. 549 (1920) (grant of land to Montana for school purposes on Fort Peck Reservation); Pub. L. No. 58-159, § 8, 35

educational services primarily to Indian youth. Aside from those activities occurring at the school facilities, the districts offer related services such as bus transportation to and from students' homes for daily classes and extracurricular activities; such transportation may consequently involve operation of school district vehicles wholly within or partially without the reservations. State and county funding for the facilities located within reservations will, for the 1983-1984

(Footnote continued)
Stat. 302, 303-04 (1904) (grant of land to Montana on Flathead Reservation for school purposes); Pub. L. No. 65-246 1/2, 40 Stat. 1053 (1919) (grant of land to Missoula County on Flathead Reservation for school purposes); Pub. L. No. 69-330, § 4, 44 Stat. 690, 691-92 (1926) (authority to Secretary of Interior to set aside and issue patents for land at Lame Deer, Montana on Northern Cheyenne Reservation for school sites).

fiscal year, be approximately 21.8 million dollars.[2/] The operation of these school districts thus materially differs from that in Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832 (1982), where the involved facility was operated by a school board formed pursuant to the Navajo Tribal Code and received no state financial assistance.

Under Pub. L. No. 63-310, 38 Stat. 1188 (1915), Montana was given authority to establish roads within reservations following approval by the affected reservation's superintendent. Montana

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2/ There are 17 Montana school districts maintaining elementary or secondary schools in locations which, although not within the exterior boundaries of an Indian reservation, border on the reservation and serve many Indian youth. Transportation is provided to these students and, which, like that offered by on-reservation schools, occurs both within and without the reservation.

and other amici states were extended similar authority, upon permission by the Secretary of the Interior, under 25 U.S.C. § 311 (1983). See 25 C.F.R. § 169.28. Implicit under Pub. L. No. 63-310 and express under the Secretary's regulations implementing 25 U.S.C. § 311 is the states' duty to maintain highways once established. See 25 C.F.R. § 169.5(a). Use of the granted easement is, moreover, governed by state law. United States v. Oklahoma Gas & Electric, 318 U.S. 206, 210 (1943). Thus, although the Ninth Circuit has observed in dicta that tribal members may not, within their particular reservations, be subject to enforcement of state traffic laws by state officers except as provided under 18 U.S.C. § 1162 (1966), all other persons unquestionably are. United States v. Harvey, 701 F.2d 800, 805

(1983). The amici states accordingly have a substantial presence on many reservations through highway construction, maintenance and law enforcement activities, with the attendant possibility of litigation over, inter alia, tortious conduct by their employees.

While this description of the interaction between state government and tribes or their members has focused on educational and highway matters in Montana, a similar relationship exists in the other amici states in these and other areas. The breadth and regularity of intergovernmental contacts are presently significant because they create the possibility, indeed the likelihood, of tribal civil adjudicatory proceedings over issues such as the personal injury herein and for attempted execution upon

state property located within reservations. It is also clear that, since the amici states' activities occur within the exterior boundaries of the reservations on both state-owned and trust lands and will frequently involve contact between nontribal employees and tribal members, substantial jurisdictional questions may arise in these tribal proceedings. The immediate effect of the Court of Appeals' decision below is, in a civil adjudicatory context, to permit tribes through internal legislation and their courts through judicial construction or common law development to define the scope of their civil jurisdiction without the opportunity for federal court review at the instance of the nonconsenting

party.[3/] A probable secondary effect of the decision will be creation by each tribe of differing jurisdictional standards whose reach will be unlimited by federal law.[4/]

II. THE SCOPE OF TRIBAL SOVEREIGNTY HAS TRADITIONALLY BEEN A MATTER DETERMINED WITH REFERENCE TO FEDERAL PRINCIPLES. A FEDERAL FORUM IS

[3/] While state court and, eventually, this Court's review could occur through a collateral action initiated by the party prevailing in the tribal proceeding, the nonprevailing party has no recourse with respect to enforcement of a final tribal court judgment as to on-reservation property. The possibility of collateral review is thus beyond the control of the party challenging the tribal court's jurisdiction. Because many amici states have substantial property within the reservations upon which execution may be made, the absence of independent review of jurisdiction issues is especially significant.

[4/] It must be emphasized that, for present purposes, the amici states' concern is not that tribal courts will rule in a biased manner but that neither tribes nor their courts will have any restraints upon them in fashioning and applying jurisdictional standards.

THEREFORE ESSENTIAL TO ESTABLISHING A CONSISTENT APPLICATION OF SOVEREIGNTY PRINCIPLES WITH RESPECT TO THE PERMISSIBLE RANGE OF TRIBAL CIVIL ADJUDICATORY JURISDICTION.

Federal jurisdiction was not questioned below by the respondents. Relying on City of Milwaukee v. Illinois, 451 U.S. 304 (1981), the Court of Appeals nonetheless refused to invoke the federal common law doctrine as basis for jurisdiction under 28 U.S.C. § 1331.[5/]

[5/] In City of Milwaukee the Court held that the federal common law doctrine could not serve as basis for an action by a state to enjoin, as a public nuisance, the discharge of inadequately treated sewage into Lake Michigan by a municipality of another state. The holding was premised on enactment of the 1972 Amendments to the Federal Water Pollution Control Act, Pub. L. No. 92-500, 86 Stat. 816, which "occupied the field [of water pollution control] through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." 451 U.S. at 317. City of Milwaukee is thus factually and legally inapposite to this matter.

However, federal common law has been developed when "a federal rule of decision is 'necessary to protect uniquely federal interests.'..." Texas Industries v. Radcliffe Materials, 451 U.S. 630, 640 (1981). The federal common law concept has, moreover, been used when, in its absence, nonfederal tribunals would be "left free to formulate their own rules" concerning a doctrine of particularly federal interest, with the result that "the purposes behind the doctrine would be as effectively undermined as if there had been no federal pronouncement on the subject." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 424 (1964). That Indian law generally and, more specifically, the scope of tribal sovereignty have been areas of exclusive federal regulation cannot be disputed.

See Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) (sustaining 28 U.S.C. §§ 1331 and 1362 jurisdiction over complaint alleging, inter alia, cession of tribal lands to state was unconscionable and for an inadequate price); Oneida Indian Nation v. County of Oneida, 719 F.2d 525, 530 (2d Cir. 1983), cert. granted, 104 S. Ct. 1590 (1984) (specifically recognizing federal common law as claim concerning tribe's possessory rights).

Since Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), the Court has repeatedly addressed the general question of what degree of sovereignty Indian tribes possess. These cases have generally arisen from regulation by the states of reservation conduct. In White Mountain Apache Tribe

v. Bracker, 448 U.S. 136, 142-43 (1980), the Court described the role of tribal sovereignty in determining whether Arizona taxing statutes could be applied to on-reservation timbering activity by a non-Indian joint venture:

> Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art. 1, § 8, cl. 3.... This congressional authority and the "semi-independent position" of Indian tribes have given rise to two independent, but related, barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law.... Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and to be ruled by them."... The two barriers are independent because either, standing alone, can be a sufficient basis for holding a state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the

> broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop,' ...against which vague or ambiguous federal enactments must always be measured. [Citations omitted.]

See, e.g., Rice v. Rehner, 103 S. Ct. 3291, 3294-96 (1983); New Mexico v. Mescalero Apache Tribe, 103 S. Ct. 2378, 2385 (1983); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144-48 (1982); Montana v. United States, 450 U.S. 544, 563-67 (1981). The Court has applied analogous principles in restricting state civil jurisdiction over reservation conduct. Williams v. Lee, 358 U.S. 217 (1958); Fisher v. District Court, 424 U.S. 382 (1976).

The scope of tribal sovereignty has, moreover, been determined with respect to federal and tribal criminal proceedings in a manner consistent with the

preemption analysis used as to state regulation. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); United States v. Wheeler, 435 U.S. 313 (1978); see also Ex parte Crow Dog, 109 U.S. 556 (1883). The Court thus commented in Oliphant, 435 U.S. at 206, that "'Indian law' draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress which beyond their actual text formed backdrop for the intricate web of judicially made Indian law." It is clear that the contours of tribal sovereignty must, in all contexts, be traced primarily by reference to federal law. See United States v. Wheeler, 435 U.S. at 323.

Indeed, the Court of Appeals itself noted that, under prior decisions, it had accepted federal question jurisdiction with respect to the extent of tribal

regulatory powers. See Cardin v. De La Cruz, 671 F.2d 363 (9th Cir.), cert. denied, 459 U.S. 967 (1982); Babbit Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983), cert. denied, 104 S. Ct. 1707 (1984). While the exercise of adjudicatory and regulatory power may differ in form, a challenge as herein to the very right of a tribe to act focuses on the same question: Does the federally-developed doctrine of tribal sovereignty authorize the nonconsensual assertion of tribal control over tortious conduct within the reservation's exterior boundaries? The substantive issue herein is thus strikingly similar to that in United States v. Wheeler, 435 U.S. at 322: "Is [the power of a tribe to punish members] part of inherent tribal sovereignty, or an aspect of the sovereignty which has been delegated to

the tribes by Congress?" Although characterization of tribal conduct as adjudicatory or regulatory may affect the ultimate resolution of that question, it does not strip the inquiry of its quintessentially federal nature. See Pet. App. 9a (Wright, J., dissenting). The Court of Appeals' conclusory and sua sponte determination that § 1331 jurisdiction did not exist clearly raises a substantial federal question which, for those reasons stated above, has far-reaching legal and practical consequences and should be reviewed by this Court.

CONCLUSION

The amici curiae states respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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Office - Supreme Court, U.S
FILED
OCT 31 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-320

IN THE

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OCTOBER TERM, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES; and LODGE GRASS SCHOOL DISTRICT No. 27,

Petitioners,

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CROW TRIBE OF INDIANS: LEROY SAGE, a minor; FLORA NOT AFRAID, his guardian; THE TRIBAL COURT OF THE CROW INDIAN RESERVATION: EDDIE ROUNDFACE, GLEN BIRDINGROUND, and IRA LEFT HAND, Judges of the Tribal Court of the Crow Indian Reservation; CROW INDIAN TRIBAL COUNCIL; and DONALD STUART, Chairman of the Crow Indian Tribal Council,

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BRIEF OF AMICUS CURIAE STATE OF WASHINGTON IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATE PRINTING PLANT 3 OLYMPIA, WASHINGTON

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STATE PRINTING PLANT 3 OLYMPIA, WASHINGTON

QUESTIONS PRESENTED

1. Whether there is a federal claim for relief against Indian tribal governments that unlawfully assert civil jurisdiction over non-Indians.

2. Whether the Tribal Court of the Crow Indian Reservation has jurisdiction over claims that involve the State of Montana (or its subdivisions), that arise on state-owned land, and that occur in connection with activities that are compelled or encouraged by state and federal law or policy.

TABLE OF CONTENTS

	Page
Questions Presented	iii
Interest of the State of Washington	1
Reasons for Granting the Writ	3
Conclusion	6

TABLE OF AUTHORITIES

Cases

Cardin v. DeLaCruz, 671 F.2d 363 (9th Cir. 1982), *cert. den.* 459 U.S. 967 (1982)	5
National Farmers Union Ins. Co. v. Crow Tribe, ___ U.S. ___, 53 L.W. 3167 (1984) (Opinion of Mr. Justice Rehnquist in Chambers)	3, 4
Nevada v. Hall, 440 U.S. 410 (1979)	4
Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978)	2, 3
Powell v. McCormack, 395 U.S. 486 (1969)	4
Puyallup Tribe v. Washington Department of Game, 391 U.S. 392 (1968)	2
Puyallup Tribe v. Washington Department of Game, 433 U.S. 165 (1973)	2
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)	5
Snow v. Quinault Indian Nation, 709 F.2d 1319 (9th Cir. 1983) *cert. den.* ___ U.S. ___, 52 L.W. 3860 (1984)	5
United States v. Mitchell, ___ U.S. ___, 51 L.W. 4999 (1983)	2
Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980)	2

Statutes

General Allotment Act of 1887, 24 Stat. 388	2
25 U.S.C. § 1302 et seq. (Indian Civil Rights Act)	3, 5

Miscellaneous:

U.S. Bureau of the Census, General Population Characteristics, United States Summary, 1980 Census of the Population, Table 71, "General Characteristics for American Indian Persons on Reservations and Alaska Native Villages"	2

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INTEREST OF THE STATE OF WASHINGTON

In the State of Washington, there are twenty-five Indian Reservations. The population and land ownership patterns on these Reservations, which give rise to the

State's concern in this case, are not unfamiliar to this Court from previous cases.[1]

Much of the land on these reservations has passed into non-Indian ownership, pursuant to federal policies which, though initiated in the last quarter of the last century,[2] continue in their effect to this day. According to 1980 census data, some 79,000 persons live within twenty-three of these reservations, of whom some 16,000 are Indians, and the rest, some 63,000, are non-Indians.[3]

These reservation residents, Indian and non-Indian alike, require the same sorts of governmental services as all other residents of the State. Such on-reservation services include the provision of roads, police protection, schools and various social services. For example, in Washington there are over 40 separate school districts located in whole or in part within a reservation, serving over 7,000 Indian children.

The State of Washington, accordingly, has a two-fold interest in this case. First, it has a direct interest stemming from the on-reservation activities of its agencies and local

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[1]See *Puyallup Tribe v. Washington Department of Game*, 391 U.S. 392, at 395, n. 1 (1968), and 433 U.S. 165, at 174 (1977) (Puyallup Reservation); *Oliphant v. Suquamish Tribe*, 435 U.S. 191, at 193 n. 1 (1978) (Port Madison Reservation); *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, at 143, 144 (1980) (Colville, Lummi, Makah, and Yakima Reservations); and *United States v. Mitchell*, ___ U.S. ___, 51 L.W. 4999, 5000 (1983) (Quinault Reservation).

[2]These policies were principally embodied in the General Allotment Act of 1887, 24 Stat. 388.

[3]See General Population Characteristics, United States Summary, 1980 Census of Population, Bureau of the Census, Table 71, "General Characteristics for American Indian Persons on Reservations and Alaska Native Villages," pp. 1-300 through 1-303. The classification in Table 71, it should be noted, allows only an approximation of tribal and non-tribal members, since some Indians may well not be members of the tribe on whose reservation they reside.

These non-member Indians are, vis-a-vis the Tribe, in the same legal status as non-Indians. Cf *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, at 161 (1980). And our concern, accordingly, extends to them as well. We shall, however, use in this brief the Census Bureau classification, "Indian" and "Non-Indian", rather than "member" and "non-member".

governments. To what extent do these activities subject those agencies and local governments to tribal jurisdiction of one sort or another?

Second, the State has a less direct, but no less important interest. It is the same interest as prompted the participation of the State Attorney General as amicus curiae in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Simply put, that interest is in protecting a large group of the State's citizens from the power of a tribal government in which they cannot participate in any way and whose actions, even when violative of the Indian Civil Rights Act, 25 U.S.C. § 1302 et seq., cannot be challenged in a federal court. After *Oliphant*, protection exists in the criminal area. But at least in the Ninth Circuit, little if any such protection exists in the civil area, as the opinion of the Ninth Circuit in this case demonstrates so strikingly.

REASONS FOR GRANTING THE WRIT

This case presents two separate, but closely related, questions. The first involves the existence of a remedy in federal court for an unlawful exercise of jurisdiction by a tribal court over a non-Indian. The second involves the criteria for determining whether such an exercise of jurisdiction is actually lawful or not. We believe that both questions merit review by this Court.

The reasons for reviewing the first question are fully set out in the opinion of Mr. Justice Rehnquist issued in chambers on September 10, 1984, staying the mandate of the court below until this Court's disposition of the Petition for Certiorari. ___ U.S. ___, 53 L.W. 3167. Similar and equally compelling reasons exist for reviewing the second question as well. The opinion of Mr. Justice Rehnquist provides the starting point for showing why this is so.

Under our system of government, there exist only two types of sovereigns, the Federal Government and the States.

> " 'Indians are within the geographical limits of the United States. The soil and people within these limits

are under the political control of the Government of the United States, or the States of the Union. There exists in the broad domain of a sovereignty but these two.' " 53 L.W. 3167, quoting from *United States v. Kagama,* 118 U.S. 375, 139 (1886).

The power of each of these two sovereigns is subject to constitutional limitations, and this Court has the ultimate authority to determine whether either sovereign has exceeded those limitations in any given case. *Ibid.*

Under the result reached by the court below, however, Indian tribes, which are not true sovereigns, have become, as a practical matter, what might be called "super-sovereigns".[1] For under the opinion of the court below, the decisions of tribal courts as to the extent of their powers under federal law are off-limits to any scrutiny by the federal courts, including this Court. Such a result is "indeed anomalous". *Ibid.*

An anomaly no less disturbing than that described by Mr. Justice Rehnquist and very similar to it in character arises if a tribal court were to possess the broad jurisdiction over non-Indian persons and entities which the Crow tribal court has asserted in this case. For this reason, the second question as well should be reviewed.

Under our system of government in this Nation, there are not only external constraints on governmental power, i.e., constitutional limitations enforced by state and federal courts, but internal constraints as well, enforced through the political process, i.e., by the voters.

"A fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them'." *Powell v. McCormack,* 395 U.S. 486, at 547 (1969). And as stated in *Nevada v. Hall,* 440 U.S. 410, 426 (1979), "In this Nation each sovereign governs only with the consent of the governed." For those persons, however, who lawfully reside on a reservation at the invitation of the United States (see, page 2, *supra*) this "fundamental principle" has become a

[1]This term is ours, not Mr. Justice Rehnquist's. But we believe it accurately expresses his point.

nullity. As non-members of the Tribe, they cannot participate in the exercise of the tribal governmental power to which they are now subject. And the Tribe is completely free, in the exercise of that power, from the political constraints which their participation would entail.

We are not here suggesting, of course, that school districts, such as the Petitioner here, should be allowed to vote, or that judges, tribal or otherwise, should be elected. Our point is much more fundamental. On-reservation non-Indian residents will inevitably be the targets of expanded tribal court jurisdiction of the sort exercised in this case. Such jurisdiction is presumably subject to the control of the tribal legislative body. But those non-Indian residents have no voice whatsoever within that legislative body. And thus freed of any internal political constraints, tribal government once again becomes a type of super-sovereign.

Further, this second sort of super-sovereignty, if allowed to stand, is likely to be more pervasive than the first. For it involves not just assertions of judicial jurisdiction, but legislative jurisdiction as well, as shown by previous decisions of the court below. That court has held, for example, that a tribe can impose a tribal building code upon property owned by a non-Indian reservation resident. See *Cardin v. DeLaCruz,* 671 F.2d 363 (9th Cir. 1982), *cert. den.* 459 U.S. 967 (1982). It has also held that a tribe can impose a tax upon the business of a non-Indian conducted upon his own property. *Snow v. Quinault Indian Nation,* 709 F.2d 1319 (9th Cir. 1983) *cert. den.* ___ U.S. ___, 52 L.W. 3422 (1984). As these opinions demonstrate, as long as a Tribe can proffer a minimal interest in asserting jurisdiction over non-Indians, the Ninth Circuit will uphold that jurisdiction, and thereby confer the status of super-sovereign upon the Tribe.

One final consideration. Involved in both of the questions presented is the vexing issue of the applicability of *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978) to claims of tribal violations of the Indian Civil Rights Act asserted by non-Indians. In this case, just as in *Snow v. Quinault, supra,* the court below has effectively made that

Act a nullity when it is invoked by non-Indians in a federal court in order to challenge the actions of a tribal court, as here, or of a tribal legislative body, as in *Snow*. Whether it is such a nullity is an important issue, which should be reviewed by this Court.

CONCLUSION

For the reasons given in the Petition for Certiorari, in the amicus brief of our sister states, and in this brief, the Petition for Certiorari should be granted.

RESPECTFULLY SUBMITTED this 29th day of October, 1984.

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FILED
NOV 9 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES; and LODGE GRASS SCHOOL DISTRICT NO. 27,
Petitioners,

v.

CROW TRIBE OF INDIANS; LEROY SAGE, a minor; FLORA NOT AFRAID, his guardian; THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; EDDIE ROUNDFACE, GLEN BIRDINGROUND, and IRA LEFT HAND, Judges of the Tribal Court of the Crow Indian Reservation; CROW INDIAN TRIBAL COUNCIL; and DONALD STUART, Chairman of the Crow Indian Tribal Council,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
I. Although Effectively Conceding the Importance of the Questions Presented, Respondents Do Not and Cannot Demonstrate That Congress Has Granted To Indian Tribes or Their Courts the Unreviewable Power To Determine Their Own Jurisdiction *Vis-A-Vis* the Federal and State Governments and Non-Indian Citizens	4
II. Respondents' Misplaced Reliance on an "Exhaustion" Doctrine Not Imposed by the Ninth Circuit Underscores the Need for Plenary Review by This Court	5
III. The Court Should Also Grant Review of Petitioners' Second Question Concerning the Scope of the Tribal Court's Jurisdiction	7
CONCLUSION	8

TABLE OF AUTHORITIES

CASES:	Page
Cardillo v. Liberty Mutual Insurance Co., 330 U.S. 469 (1947)	8
Durfee v. Duke, 375 U.S. 106 (1963)	6
Ecker v. Western Pacific R.R. Corp., 318 U.S. 448 (1943)	8
Gibson v. Berryhill, 411 U.S. 564 (1973)	7
Lane v. Wilson, 307 U.S. 268 (1939)	7
Montana v. United States, 450 U.S. 544 (1981)	8
New York Transit Authority v. Beazer, 440 U.S. 568 (1979)	8
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)	8
Patterson v. Lamb, 329 U.S. 539 (1947)	3
R.J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979 (9th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3846 (U.S. April 27, 1984) (No. 83-1811)	3, 8, 9
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)	*passim*
U.S. v. Blackfeet Tribe of the Blackfeet Indian Reservation, 369 F. Supp. 562 (D. Mont. 1973)	7
U.S. v. Powell, 330 U.S. 238 (1947)	3
U.S. v. Standard Oil Co., 332 U.S. 301 (1947)	3
STATUTES AND REGULATIONS:	
Anti-Injunction Act, 28 U.S.C. § 2283	
Indian Civil Rights Act of 1968:	
25 U.S.C. §§ 1301-41(1982)	*passim*
25 U.S.C. § 1301(1)	4
25 U.S.C. § 1302	4

IN THE

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Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Respondents' briefs in opposition to the Petition[1] make no effort to contest petitioners' showing that this case presents important and recurring questions concerning the

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[1] Brief for Respondents Crow Tribe of Indians and Crow Tribal Officials in Opposition, dated October 29, 1984 (hereinafter "Tribe Opp. Br."); and Reply in Opposition to Petition for Certiorari, dated October 26, 1984 and filed on behalf of respondents Leroy Sage and Flora Not Afraid (hereinafter "Sage Opp. Br.").

role of the federal courts in protecting non-Indians from abuses of tribal court jurisdiction.[2]

Thus, as effectively conceded by respondents and detailed in the *amici curiae* briefs filed on behalf of ten different States,[3] the Ninth Circuit's decision below will have broad legal and commercial consequences because of the extensive interface between Indian and non-Indian interests on reservations throughout this Nation, and because of the ever-wider jurisdictional claims being made increasingly by Indian tribal courts. Pet. at 11-14; Nine States Br. at 2-4; Washington State Br. at 2-3; Glacier Country Br. at 3. Nor can respondents dispute the fact—spotlighted by Justice Rehnquist's opinion in chambers granting petitioners' Application for Stay[4]—that the decision of the Court of Appeals marks an abrupt departure from the long history of federal court review of the powers of Indian tribal government *vis-a-vis* the State and Federal Governments

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[2] *See* Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, dated August 29, 1984 and filed on behalf of petitioners National Farmers Union Insurance Companies, *et al.* at 8-14 (hereinafter "Pet.").

[3] Brief of Nine *Amici Curiae* States in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, filed on behalf of Montana, Arizona, Minnesota, North Carolina, North Dakota, Oklahoma, South Dakota, Wisconsin and Wyoming (hereinafter "Nine States Br."); Brief of Amicus Curiae State of Washington in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit (hereinafter "Washington State Br."); and Brief of Glacier County, Montana and of the East Glacier County Water and Sewer District as Amicus Curiae in Support of Petition (hereinafter "Glacier County Br.").

[4] *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, No. A-123, slip op. (September 10, 1984) (Rehnquist, J., in chambers) (hereinafter "Stay Ruling").

Because Justice Rehnquist's opinion was issued after the filing of the Petition, petitioners have reproduced it in a Supplemental Appendix (hereinafter "Pet. Supp. App.") to this Reply Brief.

and non-Indian citizens. Pet. at 9-10; Stay Ruling at 2-6 (Pet. Supp. App. at 2a-6a).

Rather than challenge the importance of the case,[5] respondents argue in essence that it was correctly decided below. Specifically, respondents claim that the Court of Appeals correctly interpreted this Court's decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), as imposing *sub silentio* dramatic new constraints on the traditional role of the federal courts in reviewing assertions of tribal authority. Tribe Opp. Br. at 6-7; Sage Opp. Br. at 3-6. Nonetheless, apparently recognizing that *Santa Clara Pueblo* may only preclude federal court review of *intra-tribal* disputes involving claimed violations of the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-41 (1982) (hereinafter "ICRA")(*see* Pet. at 14-15), respondents' primary argument is that the Ninth Circuit decision can somehow be interpreted as preserving petitioners' federal remedies *after* the tribal court has first ruled on the matter. Tribe Opp. Br. at 7-12; Sage Opp. Br. at 6-13.

We demonstrate below that these arguments are misplaced and in fact spotlight the need for plenary review by this Court of both of the questions presented in the Petition. We also show that at a minimum, the Petition in this case should be held pending disposition of *R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3846 (U.S. April 27, 1984) (No. 83-1811), which the Court of Appeals found dispositive of this case. 736 F.2d at 1322 (Appendix to Petition for Writ of Certiorari (*see* n.2) at 4a-5a (hereinafter "Pet. App.")).

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[5] The important and recurring nature of the questions presented is, of course, sufficient by itself to justify granting the Petition. *See, e.g., U.S. v. Powell*, 330 U.S. 238, 240 (1947); *U.S. v. Standard Oil Co.*, 332 U.S. 301, 303 (1947); *Patterson v. Lamb*, 329 U.S. 539, 541 (1947)

I. Although Effectively Conceding the Importance of the Questions Presented, Respondents Do Not and Cannot Demonstrate That Congress Has Granted To Indian Tribes or Their Courts the Unreviewable Power To Determine Their Own Jurisdiction *Vis-A-Vis* the Federal and State Governments and Non-Indian Citizens.

Although respondents argue that *Santa Clara Pueblo* precludes federal court review of tribal court assertions of civil jurisdiction over non-Indians, they can identify nothing in Justice Marshall's opinion for the Court that supports the sweeping new restrictions imposed by the Ninth Circuit here. Respondents point only to the Court's recognition that Congress intended to "protect tribal sovereignty" when it enacted the ICRA (Tribe Opp. Br. at 6; *see also* Sage Opp. at 4-6), while altogether failing to mention that the *scope* of tribal sovereignty is precisely the issue presented in this case. As Justice Rehnquist's opinion in chambers makes clear, it is one thing to make tribal courts the exclusive forum for resolving an alleged "violation of [the] terms" of the ICRA or other intra-tribal controversies over which the tribal court's jurisdiction is unquestioned; it is quite another to hold, as the Ninth Circuit did, that a tribal court also has the untrammeled power to "decide[] a federal question as to the extent of its jurisdiction." Stay Ruling at 4, 6 (Pet. Supp. App. at 4a, 6a).

Indeed, both the ICRA and this Court's decision in *Santa Clara Pueblo* make clear that Congress did not intend to delegate to Indian Tribes and their courts the unconstrained power to determine their own jurisdiction over non-Indians. The Act itself recognizes that Indian tribes are "subject to the jurisdiction of the United States" (25 U.S.C. § 1301(1)), and in any event applies only to tribes "exercising [the] powers of *self*-government." *Id.* § 1302 (emphasis supplied). *Santa Clara Pueblo* confirms that the ICRA "represents an exercise" of Congress' "plenary authority to limit, modify or

eliminate the powers of *local self-government* which the tribes otherwise possess" to regulate "'*internal and social relations.*'" 436 U.S. at 55-57 (emphasis supplied, citations omitted). In other words, while Congress may have precluded federal court review of the merits of tribal decisions concerning intra-tribal controversies plainly within their jurisdiction, there is no indication in the ICRA or in *Santa Clara Pueblo* that Congress granted to tribes and tribal courts the unfettered power to expand their authority *vis-a-vis* the Federal or State Governments or non-Indian citizens.[6]

II. Respondents' Misplaced Reliance on an "Exhaustion" Doctrine Not Imposed by the Ninth Circuit Underscores the Need for Plenary Review by This Court.

Apparently recognizing that there is a federal cause of action for abuse of tribal jurisdiction, respondents focus most of their attention on the issue of "exhaustion of available tribal remedies," arguing that this Court should decline review because the Ninth Circuit decison can somehow be read to allow petitioners to "reinitiate their suit in federal court" after the tribal court has addressed the controversy. Tribe Opp. Br. at 7-8. The difficulty with this position is that the Court of Appeals did not so rule. To the contrary, the majority opinion makes it quite clear that "exhaustion of tribal remedies" arguments were rendered irrelevant by its holding that petitioners' challenge to the jurisdiction of the tribal court "fail[ed] to state a claim for federal relief." 736 F.2d at 1323 & n.4 (Pet. App. at 7a). Indeed, the essence of the ruling was obvious enough to lead Circuit Judge Wright, concerned that "[t]he majority

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[6] As discussed below, the separate question of whether non-Indian litigants have a federal cause of action for violations of the ICRA is presented in a separate case pending before the Court. If the Court grants review and holds that such a federal claim exists, the decision below in this case should of course be summarily reversed.

... makes the tribal court the first *and last* arbiter of its own jurisdiction," to "dissent from the holding that we lack subject matter jurisdiction." 736 F.2d at 1324, 1325 (Pet. App. at 8a, 12a) (emphasis in original).

Consequently, respondents' "exhaustion" and "comity" arguments implicitly recognize that this case was incorrectly decided below and only serve to highlight the need for prompt review by this Court. They are appropriately raised, if at all, only on the merits.

In any event, respondents' contention that "exhaustion" and "comity" principles should be extended to the present circumstances is without merit. Since, as respondents concede, the federal courts lack appellate power to directly review the judgments of Indian tribal courts (Sage Opp. Br. at 13-14; *see also* Stay Ruling at 6 (Pet. Supp. App. at 6a)),[7] petitioners might well be conclusively bound if they were forced to submit their jurisdictional challenge to the tribal court in the first instance. *Cf. Durfee v. Duke*, 375 U.S. 106 (1963).[8] Even if "exhaustion" principles had some

[7] Respondents Sage and Not Afraid do make the novel argument that the Supreme Court has direct appellate jurisdiction, supposedly granted by the Constitution, to review Indian tribal court judgments. Sage Opp. Br. at 8-13. Quite apart from the fact that the decisions cited appear to directly negate this contention (*id.* at 9-11), the Ninth Circuit certainly did not accept it and accordingly, like the "exhaustion" argument, it is appropriately raised only on the merits.

[8] Such preclusion might be found if, as *Santa Clara Pueblo* suggests, "full faith and credit" is extended to tribal court judgments in some circumstances. 436 U.S. at 65, 66 n.21. If "full faith and credit" are not due tribal court decisions on jurisdictional matters, "exhaustion" is of course a pointless exercise.

application here (which they do not),[9] it is well-settled that (i) "exhaustion" applies to administrative, but not judicial, remedies, *Gibson v. Berryhill*, 411 U.S. 564, 574 n.13 (1973), and (ii) only "adequate" administrative remedies need be exhausted. *Id.* at 575 n.14; *Lane v. Wilson*, 307 U.S. 268, 274-75 (1939). The Crow Tribe's own Opposition Brief in this Court leaves no doubt about the futility of requiring petitioners to exhaust Crow Tribal Court remedies in this case: "[t]ribal jurisdiction over disputes such as this one is an essential aspect of the retained sovereign power of the Crow Tribe." Tribe Opp. Br. at 14.

III. The Court Should Also Grant Review of Petitioners' Second Question Concerning the Scope of the Tribal Court's Jurisdiction.

The Crow Tribe respondents argue that review of the second question presented in the Petition should be denied because it was "not reached by the Ninth Circuit." Tribe Opp. Br. at 12-13. While it is true that the Ninth Circuit found it unnecessary to reach this issue, the question was fully briefed and the majority opinion does address it in some detail—to the point of articulating a test for the propriety of tribal court jurisdiction. 736 F.2d at 1322 & n.3 (Pet. App. at 4a). Accordingly, a remand to the Ninth Circuit following review by this Court of the threshold question of federal remedies would be a pointless exercise.

[9] Apart from lower federal court decisions that were implicitly overruled by *Santa Clara Pueblo*, respondents cite only cases involving federal court refusals to interfere with *state* court civil and criminal prosecutions. Tribe Opp. Br. at 8-9; Sage Opp. Br. at 13-14. What respondents neglect to mention is that these decisions are predicated on the Federal Anti-Injunction Act, 28 U.S.C. § 2283, which by its terms applies only to state court proceedings. The Act has previously been held to be ineffective to prevent a federal court injunction against tribal courts acting in excess of their jurisdiction. *See, e.g., U.S. v. Blackfeet Tribe of the Blackfeet Indian Reservation*, 369 F. Supp. 562, 565 (D. Mont. 1973).

Moreover, the issue was thoroughly addressed (correctly, we believe) by the District Court below (*see* Pet. at 3-5; pet. App. at 18a-24a), and has been decided in a wide variety of factual contexts by other lower federal courts. Pet. at 11-13 (citing cases). *See also* Glacier County Br. at 3-10; Washington State Br. at 3-6.

Given the concededly important and recurring nature of the issues presented, the better and more efficient course would be to grant review on both questions presented by the Petition. *Cf. Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 473-74 (1947) (Although the Court of Appeals failed to reach an important issue, remand on that issue was deemed unwarranted when the District Court had reached the issue and it was fully briefed and argued to the Supreme Court.); *Ecker v. Western Pacific R.R. Corp.*, 318 U.S. 448, 489 (1943); *New York Transit Authority v. Beazer*, 440 U.S. 568, 583-84 n.24 (1979).

CONCLUSION

For the reasons stated above and in the Petition, petitioners respectfully ask that a writ of certiorari be issued to review the decision of the Ninth Circuit in this case. Not only are important and recurring federal questions concerning the rule of the federal courts in resolving questions of Indian tribal sovereignty presented, but in addition the Ninth Circuit decision below incorrectly interprets this Court's decision in *Santa Clara Pueblo* as announcing a sharp reduction in the federal role that cannot be squared with decisions such as *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) and *Montana v. United States*, 450 U.S. 544 (1981).

In the event that the Court determines that the questions presented here do not merit review, it should at a minimum hold the Petition pending disposition of the petition for certiorari in *R.J. Williams Co.*, No. 83-1811,

which presents the separate question of whether non-Indian parties have a federal claim for violations of the ICRA. The majority opinion below found *R.J. Williams Co.* dispositive of the instant case. 736 F.2d at 1322 (Pet. App. at 4a-5a). If the Court accepts review in No. 83-1811 and holds that there is such a federal claim, this case should be summarily reversed and remanded.

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November 8, 1984

SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX

SUPREME COURT OF THE UNITED STATES

No. A-123 (84-320)

NATIONAL FARMERS UNION INSURANCE COMPANIES ET AL., PETITIONERS *v.* CROW TRIBE OF INDIANS ET AL.

ON APPLICATION FOR STAY

[September 10, 1984]

JUSTICE REHNQUIST, Circuit Justice.

Applicants National Farmers Union Insurance Companies and Lodge Grass School District No. 27 request that I stay the mandate of the United States Court of Appeals for the Ninth Circuit which reversed the judgment of the United States District Court for the District of Montana. The latter court had enjoined the Crow Tribe of Indians from executing against the applicants on a judgment rendered by the Crow Tribal Court. The Court of Appeals for the Ninth Circuit held, as I read its opinion, that litigants who seek to challenge the exercise of jurisdiction by an Indian Tribal Court in a civil action have no federal court remedy of any kind. I have concluded that four Members of this Court are likely to vote to grant the applicants' petition for certiorari, and that the applicants have a reasonable probability for at least partial success on the merits if this Court grants certiorari. I have therefore decided that the temporary stay I earlier granted on August 21, 1984, pending consideration of a response, should be continued until this Court disposes of the applicants' petition for certiorari which was filed on August 29th.

In May, 1981, Leroy Sage, a Crow Indian school child, was struck by an uninsured motorcyclist on the property owned by applicant School District. The school is located on land within the external boundaries of the Crow Indian Reserva-

tion, but the land is owned by the State of Montana in fee subject to a reserved mineral interest in the Tribe. Sage sustained a broken leg, and filed suit against the School District in Crow Tribal Court.

Dexter Falls Down served process for Sage upon Wesley Falls Down; Wesley was a member of the school board. Wesley did not notify anyone of the summons and a default judgment for $153,000 was entered against the school three weeks later in Tribal Court. Actual medical bills came to $3,000. Petitioners became aware of the suit when the Tribal Court mailed a copy of the judgment to the school. Instead of seeking review of the default judgment in Tribal Court, applicants filed suit in the United States District Court for the District of Montana, alleging that the Tribal Court's exercise of jurisdiction violated Due Process and the Indian Civil Rights Act, 25 U. S. C. § 1302, *et seq.* (1982). Petitioners sought a permanent injunction against the execution of the Tribal Court judgment.

The District Court held that petitioners' complaint, based on federal common law, stated a claim under 28 U. S. C. § 1331 (1982). *National Farmers Union Insurance Co.* v. *Crow Tribe of Indians*, 360 F. Supp. 213, 214–15 (D. Mont. 1983). The District Court held that the Tribal Court lacked subject matter jurisdiction over Sage's claim, because the land upon which the court had occurred was not Indian land, and the defendants were not tribal members. The District Court relied on our decision in *Montana* v. *United States*, 450 U. S. 544, 565–66 (1981) in reaching this conclusion.

The Tribe appealed to the Court of Appeals for the Ninth Circuit, and that court reversed over a partial dissent. *National Farmers Union Insurance Co.* v. *Crow Tribe of Indians*, 736 F. 2d 1320 (9th Cir. 1984). The Court of Appeals reasoned on the authority of one of its prior decisions that "Indian tribes are not constrained by the provisions of the Fourteenth Amendment." It went on to determine that tribes are bound by the provisions of the Indian Civil Rights

Act, 25 U. S. C. § 1301 *et seq.* and that § 1302(8) of this Act requires that tribal courts exercise their jurisdiction in a manner consistent with due process and equal protection. But the court then concluded that since Congress had expressly limited federal court review of a claimed violation of the ICRA to a single remedy—the writ of habeas corpus—there could be no federal court review of any tribal court exercise of jurisdiction in a civil case. The Court of Appeals for the Ninth Circuit relied in part on our decision in *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 66–70 (1977) to reach this conclusion. The Court of Appeals recognized that our decision in *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191 (1978) had relied on principles of federal common law to determine whether a tribal court had exceeded its jurisdiction, but decided that our opinion the same term in *Santa Clara Pueblo*, *supra*, suggested a restriction on federal court review of Indian tribal jurisdiction as a result of the Indian Civil Rights Act. The Court of Appeals observed in a footnote that "should Sage seek to enforce his default judgment in the courts of Montana, National may, of course, challenge the Tribal Court's jurisdiction in the collateral proceedings. See generally *Durfee* v. *Duke*, 375 U. S. 106 (1963)." 736 F. 2d 1320, 1324 n. 5.

It is clear from proceedings in this case subsequent to the handing down of the opinion of the Court of Appeals that the respondents in this case have no intention of resorting to any state court proceedings in order to enforce the judgment of the Crow Tribal Court. After the issuance of the mandate of the Court of Appeals, tribal officials, at the behest of respondent Sage, seized 12 computer terminals, other computer equipment, and a truck from the school district. The basis for this seizure was said to be the Tribal Court judgment, and no state process was invoked.

If the Court of Appeals is correct in the conclusions which it drew in its opinion, the state of the law respecting review of jurisdictional excesses on the part of Indian tribal courts is

indeed anomalous. The Court of Appeals may well be correct that tribal courts are not constrained by the Due Process or Equal Protection Clauses of the Fourteenth Amendment; long ago, this Court said in *United States* v. *Kagama*, 118 U. S. 375, 379 (1886), and repeated the statement as recently as *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191, 211 (1978):

> "Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or the States of the Union. There exists in the broad domain of a sovereignty but these two."

But if because only the national and state governments exercise true sovereignty, and are therefore subject to the commands of the Fourteenth Amendment, I cannot believe that Indian tribal courts are nonetheless free to exercise their jurisdiction in a manner prohibited by the decisions of this Court, and that a litigant who is the subject of such an exercise of jurisdiction has nowhere at all to turn for relief from a conceded excess. Every final decision of the highest court of a state in which such a decision may be had is subject to review by this Court on either certiorari or appeal. 28 U. S. C. § 1257 (1982). Every decision of a United States District Court or of a court of appeals is reviewable by this Court either by way of appeal or by certiorari. *Id.*, §§ 1252–54; *cf.* § 1291. If the courts of the states, which in common with the national government exercise the only true sovereignty exercised within our Nation, *Kagama*, *supra*, are to have their judgments reviewed by this Court on a claim of erroneous decision of a federal question, it is anomalous that no federal court, to say nothing of a state court, may review a judgment of an Indian tribal court which likewise erroneously decides a federal question as to the extent of its jurisdiction. See *Montana* v. *United States*, *supra*. It may be that Congress could provide for such a result, but I have a good deal more doubt than did the Court of Appeals that it has done so.

Our decision in *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49 (1978), which the Court of Appeals read to support its conclusion, raised the question of whether a federal court could pass on the validity of an Indian Tribe's ordinance denying membership to the children of certain female tribal members. We held that the Indian Civil Rights Act, *supra*, did not imply a private cause of action to redress violations of the statutory Bill of Rights contained in the Act, and that therefore the validity of the tribal ordinance regulating membership could not be reviewed in federal court. It seems to me that this holding, relating as it did to the relationship between the right of a Tribe to regulate its own membership and the claims of those who had been denied membership, is quite distinguishable from a claim on the part of a non-Indian that a tribal court has exceeded the bounds of tribal jurisdiction as enunciated in such decisions of this Court as *Montana* v. *United States*, *supra*. As JUSTICE WHITE pointed out in his dissent in that case, 436 U. S. 72–73, "the declared purpose of the Indian Civil Rights Act . . . is 'to ensure that the American Indian is afforded the broad constitutional rights secured to other Americans.' But as the Court also pointed out in its opinion, Congress entertained the additional purpose of promoting 'the well-established federal "policy" of furthering Indian self-Government.'" 436 U. S. 49, 62. The facts as well as the holding of *Santa Clara Pueblo*, *supra*, satisfy me that Congress' concern in enacting the Indian Civil Rights Act was to enlarge the rights of individual Indians as against the Tribe while not unduly infringing on the right of tribal self-government. The fact that no private civil cause of action is to be implied under the Indian Civil Rights Act, *Santa Clara Pueblo*, *supra*, does not to my mind foreclose the likelihood that federal jurisdiction may be invoked by one who claims to have suffered from an excess beyond federally prescribed jurisdictional limits of an Indian tribal court on the basis of federal common law. See, *e. g.*,

Illinois v. *City of Milwaukee*, 406 U. S. 91, 99–100 (1972). We said in *Oliphant* v. *Suquamish Indian Tribe*, *supra*:

> "'Indian law' draws principally on the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them."

I think a fair reading of all of our case law on this subject could lead to the conclusion that even though the Indian Civil Rights Act affords no private civil cause of action to one claiming a violation of its terms, "Indian law" as of the time that law was enacted afforded a basis for review of tribal court judgments claimed to be in excess of Tribal Court jurisdiction.

Respondents insist that under Rule 44.2 of this Court a supersedeas bond should have accompanied applicant's request for a stay. That rule provides:

> "If the stay is to act as a supersedeas, a supersedeas bond shall accompany the motion and shall have such surety or sureties as said judge, court or justice may require."

I do not think that the rule is by its terms applicable to this case. The term "supersedeas" to me suggests the order of an appellate court having authority to review on direct appeal the judgment which is superseded. All of the proceedings in the various federal courts in this case have, of course, sought no direct review of the Tribal Court judgment, which simply is not provided for by statute at all, but collateral relief. The District Court did not review the judgment of the Indian Tribal Court by way of appeal, but instead enjoined its enforcement.

It may well be that under the Federal Rules of Civil Procedure respondents would have a plausible argument to make

to the District Court that an injunction bond serving somewhat the same purposes as a supersedeas bond should be required by that court so long as its injunction remains in effect. Whether such a bond should be required of either party in this case, and whether in particular it should be required of applicant Lodge Grass School District No. 27 in view of the fact that apparently under Montana law a public body is not required to post a supersedeas bond in a state court proceeding, is an issue best left in the first instance to the District Court.

As to whether, if I am right in thinking that this Court may well decide that Tribal Court judgments are subject to federal court review for claims of jurisdictional excess, applicants would necessarily prevail, I express no opinion. The District Court held in their favor on this point, but the Court of Appeals for the Ninth Circuit found no necessity for reaching it since it held that there was no federal jurisdiction to consider it. The District Court in its opinion quoted F. Cohen, *Handbook of Federal Indian Law*, 253 (1982 Ed.), to the effect that "the extent of Tribal civil jurisdiction over the non-Indian is not fully determined." The District Court, in reaching the conclusion it did, relied on the following language from our opinion in *United States* v. *Montana*:

> "To be sure, Indian Tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on the Reservations, even on non-Indian fee lands. A Tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the Tribe or its members, through commercial dealings, contracts, leases, or other arrangements. A Tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, *supra*, 450 U. S., at 565–566.

The court concluded that exercise of tribal jurisdiction over an injury to a tribal member occurring on non-Indian owned fee land within the boundaries of the Reservation was not within the description of Indian tribal jurisdiction. I express no opinion as to what the correct answer to this inquiry may be. I do think its correct decision is of far less importance than the correct decision of the more fundamental question of whether there is any federal court review available to non-Indians for excesses of Tribal Court jurisdiction.

It is so ordered.

MOTION FILED

JAN 14 1985

(1)

No. 84-320

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

NATIONAL FARMERS UNION INSURANCE COMPANY,
Petitioner,

versus

CROW TRIBE OF INDIANS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF AMICI CURIAE SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT AND ARIZONA PUBLIC SERVICE COMPANY IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

The Salt River Project Agricultural Improvement and Power District and Arizona Public Service Company hereby move for leave to file a brief of amici curiae in support of the Petitioner in this case. The proposed brief accompanies this motion. The amici sought and obtained the consent of the Petitioner, National Farmers Union Insurance Company, and the Respondent Crow Tribe of Indians. However, counsel for the Respondents "Sage and Not Afraid" has withheld his consent.

The amici are interested in this case because they own and operate power plants on the Navajo Indian Reservation and have for many years resisted the attempts by the Navajo Tribe to exercise civil jurisdiction over them. For a more detailed statement, see the following brief at page 1. The amici believe that this case is directly controlled by Article III of the Constitution and this Court's decision in *Martin v. Hunter's Lessee*, 1 Wheat. 304, 4 L.Ed. 97 (1816). Since we have seen no evidence that this case played any role in the decision below, it will be important for this Court to have the benefit of our argument to ensure that the constitutional principle involved is not ignored.

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TABLE OF CONTENTS

	Page
INTERESTS OF THE AMICI CURIAE AND INTRODUCTION	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. IF FEDERAL LAW PROHIBITS THE EXERCISE OF JURISDICTION BY A TRIBAL COURT OVER A NON-INDIAN DEFENDANT, A FEDERAL FORUM MUST EXIST TO ENFORCE THE FEDERAL PROHIBITION	4
II. CONGRESS COULD NOT PROVIDE FOR TRIBAL COURT JURISDICTION OVER NON-INDIAN DEFENDANTS UNLESS IT, AT THE SAME TIME, ENLARGED THE APPELLATE JURISDICTION OF THE SUPREME COURT TO REVIEW FEDERAL QUESTIONS	7
CONCLUSION	9

TABLE OF AUTHORITIES

CASES:	*Page*
Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936)	8
Illinois v. City of Milwaukee, 406 U.S. 91 (1972)	3, 5
Kerr-McGee Corporation v. Navajo Tribe of Indians, Supreme Court No. 84-68	2
Martin v. Hunter's Lessee, 1 Wheat. 304, 4 L.Ed. 97 (1816)	2 *passim*
Montana v. United States, 450 U.S. 544 (1981)	3, 4, 5
National Farmers Union Insurance Companies v. Crow Tribe of Indians, 53 U.S.L.W. 3167 (Rehnquist, Circuit Justice, Sep. 10, 1984)	6, 8
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)	3, 4, 5
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)	4, 5
Talton v. Mayes, 163 U.S. 376 (1896)	4
Williams v. Lee, 358 U.S. 217 (1959)	5
CONSTITUTIONAL PROVISIONS AND STATUTES	
Article III	2 *passim*
Tenth Amendment	6
Fourteenth Amendment	4
25 U.S.C. §§ 1301-1303	4
28 U.S.C. § 1331	5

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BRIEF OF AMICI CURIAE SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT AND ARIZONA PUBLIC SERVICE COMPANY IN SUPPORT OF THE PETITIONER

INTERESTS OF THE AMICI CURIAE AND INTRODUCTION

The amicus curiae Salt River Project Agricultural Improvement and Power District, a political subdivision of the State of Arizona, is the operating agent of the Navajo Project, a coal-fired electric generating plant and attendant facilities, located on the Navajo Indian Reservation in Arizona. The Navajo Project is co-owned by the amicus, the City of Los Angeles, Arizona Public Service Company, Nevada Power Company, and Tucson Electric Power Com-

pany. Salt River Project Agricultural Improvement and Power District holds title to 24.3 percent of the Navajo Project for the use and benefit of the United States intended for use by the Department of the Interior to meet its power needs for the Central Arizona Project.

Amicus Arizona Public Service Company is the project manager of the Four Corners Generating Station, a coal-fired electric generating facility owned by Arizona Public Service Company, Tucson Electric Power Company, Public Service Company of New Mexico, Southern California Edison Company, El Paso Electric Company, and Salt River Project Agricultural Improvement and Power District. The Four Corners Generating Station is located on the Navajo Indian Reservation in New Mexico.

The amici and their on-reservation fuel suppliers, Peabody Coal Company and Utah International, have for many years disputed the right of the Navajo Tribe to tax and otherwise exercise civil jurisdiction over them. See, e.g., the briefs filed by amici in this Court in *Kerr-McGee Corporation vs. Navajo Tribe of Indians,* No. 84-68.

These electric generating plants represent capital investments in excess of $1 billion on the reservation. The amici can be directly affected by the outcome in this case and have a direct interest in protecting their investment and their operations from the exercise of unlawful tribal civil jurisdiction. This end cannot be achieved unless there is federal judicial review of federal questions decided by tribal courts.

The amici urge this Court to reverse the judgment of the Court of Appeals because it is in conflict with Article III of the United States Constitution and this Court's decision in *Martin v. Hunter's Lessee,* 1 Wheat. 304, 4 L.Ed. 97 (1816).

SUMMARY OF ARGUMENT

Wholly apart from its ultimate resolution on the merits, a claim that a tribal court has no jurisdiction over claims made against non-Indians raises a federal question under

this Court's federal common law relating to Indians. *Montana v. United States,* 450 U.S. 544, 565 (1981); *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978). The District Court had subject matter jurisdiction to entertain the claim under 28 U.S.C. § 1331, because "laws" within the meaning of Section 1331(a) embrace claims founded on federal common law. *Illinois v. City of Milwaukee,* 406 U.S. 91, 99-101 (1972).

There must be a federal forum somewhere within which to raise federal questions. Article III of the United States Constitution declares that the judicial power of the United States shall extend to all cases arising under the Constitution and laws of the United States. This case is directly controlled by *Martin v. Hunter's Lessee,* 1 Wheat. 304, 4 L.Ed. 97 (1816). The language of Article III is mandatory upon the Congress and Congress could not, without violating its duty under Article III, deny federal claimants a federal forum. *Id.* at 328. The whole judicial power of the United States must be at all times vested either in an original or appellate form in some federal court. *Id.* at 331.

Congress has not vested this Court with appellate jurisdiction over final judgments of tribal courts. Therefore, the District Court must have jurisdiction to entertain National's federal claims or else the judicial power of the United States would not be vested under *Martin v. Hunter's Lessee.*

ARGUMENT

Tribal courts either have jurisdiction over claims against non-Indians or they do not. If they do, it is because federal law permits it. If they do not, it is because federal law prohibits it. If tribal courts do not have jurisdiction over non-Indian defendants, then the United States district courts must have jurisdiction to entertain *federal* claims to be immune from tribal court jurisdiction. If tribal courts do have jurisdiction over non-Indians, then the district courts or this Court must have jurisdiction to review federal questions decided by tribal courts. We discuss' both possibilities and

show that regardless of the outcome, the Court of Appeals must be reversed.

I.

IF FEDERAL LAW PROHIBITS THE EXERCISE OF JURISDICTION BY A TRIBAL COURT OVER A NON-INDIAN DEFENDANT, A FEDERAL FORUM MUST EXIST TO ENFORCE THE FEDERAL PROHIBITION.

We agree with the District Court that a tribal court has no jurisdiction over claims made against non-Indians. In *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 211 (1978), this Court held that Indian tribal courts did not have criminal jurisdiction over non-Indian defendants because "from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty." In *Montana v. United States,* 450 U.S. 544, 565 (1981), this Court stated that "[t]hough *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the Tribe." This makes sense because the intrusion on personal liberties of Americans is the same whether a defendant in a criminal or a civil case.

Ever since *Talton v. Mayes,* 163 U.S. 376 (1896), this Court has held that the limitations imposed upon the United States by the Bill of Rights and on the states by the Fourteenth Amendment do not operate to limit the exercise of tribal governmental power over its own members. Nor does federal or state jurisdiction exist to entertain claims brought by Indians under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). Unconstrained tribal court jurisdiction over non-Indian defendants collides with non-members' expectations of the sanctity of civil liberties under our constitutional

scheme. Just as *Williams v. Lee,* 358 U.S. 217 (1959) requires suits against Indians to be brought in tribal court, *Oliphant* and *Montana* require suits against non-Indians to be brought in state or federal court. Defendants in either case would then be subject to the jurisdiction of the courts associated with the government to which they have consented to be governed.

It is true that this Court need not decide the question of tribal court jurisdiction over non-Indian defendants in this case. But what is clear from our argument against tribal court jurisdiction over non-Indian defendants is that this claim arises under federal law. The right of non-Indian defendants to be immune from tribal court jurisdiction rises or falls on the federal common law of Indian relations. The United States district courts have jurisdiction to entertain claims arising under federal law under 28 U.S.C. § 1331, including claims based upon federal common law. *Illinois v. City of Milwaukee,* 406 U.S. 91, 99-101 (1972).

The claim of a non-Indian to be immune from tribal court jurisdiction does not arise under the Indian Civil Rights Act, and therefore the rule announced in *Santa Clara Pueblo v. Martinez, supra,* is no bar to National's claim. Indeed, Congress is without power to deprive a federal claimant his right to a federal forum somewhere in the federal system. The Court of Appeals did not reach the merits of the jurisdictional challenge but was content to deny National an opportunity to present its federal claim to a federal forum even if the tribal court was without jurisdiction. In doing so, the Court of Appeals ignored a most fundamental principle of our constitutional scheme. Ever since *Martin v. Hunter's Lessee,* 1 Wheat. 304, 4 L.Ed. 97 (1816), it has been clear that there must be a federal forum somewhere within which to raise federal questions. There, this Court held that it had jurisdiction to review the judgments of state courts because Article III of the Constitution requires that the judicial power of the United States must be at all times vested either in an original or appellate form in some federal court.

As Justice Rehnquist noted in his opinion accompanying his stay order in this very case, 53 U.S.L.W. 3167 (Rehnquist, Circuit Justice, Sep. 10, 1984), this Court has jurisdiction to review on appeal or certiorari federal questions decided by state and federal courts. Nowhere has the Congress accorded this Court jurisdiction to review final decisions of tribal courts. If that be the case, then the district courts must have jurisdiction to entertain claims brought by non-Indians based upon federal law or else the entire judicial power of the United States under Article III of the Constitution would not be vested. Under Article III, federal judicial power shall extend to all cases arising under the laws of the United States. It does not state that it shall extend to some cases. As this Court stated in *Martin v. Hunter's Lessee*, the language of Article III is mandatory on the Congress, and Congress could not, without violating its duty, deny federal claimants a federal forum. 1 Wheat. at 328. [1]

The claim of National below rested on federal common law which in a very real sense has its basis in the Constitution itself. The Tenth Amendment to the Constitution declares that the powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively, or to the people. Thus, the federal Constitution guarantees to non-Indians the right to be free of tribal court jurisdiction over them. The Tenth Amendment describes the universe of sovereign powers over non-Indian Americans within the boundaries of the United States. Article III of the Constitution extends federal judicial power to all cases arising under the Constitution and the laws of the United States. National's case is such a claim to which Article III judicial power must be vested at some stage in the federal system. 1 Wheat. at 329.

[1] This Court acknowledged that in the universe of courts, federal claims under Article III could only occur in state or federal courts. 1 Wheat. at 340 ("which cases could exist in no other courts").

It is clear, therefore, that if National's claim to immunity from tribal court jurisdiction based upon federal common law and the Constitution is correct, then the judicial power of the United States under Article III of the Constitution attached to National's claim and it was error for the Court of Appeals to order its complaint dismissed. We next show that even if National's claim to be immune from tribal court jurisdiction was incorrect, the Court of Appeals still erred in dismissing its complaint.

II.

CONGRESS COULD NOT PROVIDE FOR TRIBAL COURT JURISDICTION OVER NON-INDIAN DEFENDANTS UNLESS IT, AT THE SAME TIME, ENLARGED THE APPELLATE JURISDICTION OF THE SUPREME COURT TO REVIEW FEDERAL QUESTIONS.

Unlike the District Court, the Court of Appeals did not reach the merits of National's jurisdictional challenge. Had it done so, and reached the same conclusion reached by the District Court, it would have erred in dismissing the complaint for the reasons stated above. On the other hand, if the Court of Appeals reached the question of tribal court jurisdiction over non-Indians, and concluded that such jurisdiction existed, it still would have been error to dismiss the complaint. This is so because National's claim that tribal courts have no jurisdiction over non-Indians is a *federal* claim. If a tribal court, in the exercise of its jurisdiction, reaches and decides a federal question, there is no federal judicial review of that judgment. The Congress has not enlarged the appellate jurisdiction of the Supreme Court to freely review federal questions decided by tribal courts. [2]

[2] Indeed, the failure of Congress to enlarge the appellate jurisdiction of this Court to include review of federal questions decided by tribal courts is powerful evidence that Congress understands tribal courts to be without jurisdiction over claims brought against non-Indians.

Nor has the Congress granted to the district courts appellate jurisdiction over judgments rendered by tribal courts. But Article III of the Constitution extends the judicial power of the United States to all cases arising under federal law. Congress cannot permit tribal courts to decide federal questions without at the same time providing for federal judicial review of those judgments at some stage of the federal system. *Martin v. Hunter's Lessee, supra,* 1 Wheat. at 328.

Under *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288 (1936), the Court of Appeals was bound to avoid passing upon a constitutional question if it could do so. The Court of Appeals could not have upheld tribal court jurisdiction over non-Indians asserting federal claims without at the same time concluding that the Congress unconstitutionally failed to provide for federal judicial review of tribal court judgments deciding federal questions. Thus, even had the Court of Appeals been persuaded that tribal court jurisdiction existed, the presence of a federal question and the nonexistence of federal judicial review should have persuaded the Court of Appeals that no such tribal court jurisdiction existed in the case before it and, thus, the judgment of the district court should have been affirmed.

The merits of tribal court jurisdiction seem to us to be inextricably intertwined with "the more fundamental question of whether there is any federal court review available to non-Indians for excesses of Tribal Court jurisdiction." *National Farmers Union Insurance Companies v. Crow Tribe of Indians,* 53 U.S.L.W. at 3168 (Rehnquist, Circuit Justice, Sep. 10, 1984). There can be no tribal court jurisdiction over non-Indian defendants pressing federal claims because there is no appellate jurisdiction in this Court to review federal questions decided by tribal courts. And because there is no appellate jurisdiction in this Court to review federal questions decided by tribal courts, there must be jurisdiction in the District Court to entertain National's claim. *Martin v. Hunter's Lessee, supra,* 1 Wheat. 304, 4 L.Ed. 97 (1816).

CONCLUSION

Congress has not vested this court with appellate jurisdiction over final judgments of tribal courts deciding federal questions. Unless this Court is willing to characterize this omission in its appellate jurisdiction as unconstitutional under Article III, tribal courts cannot have jurisdiction over non-Indian defendants asserting federal questions and, therefore, the District Court must have jurisdiction under Article III to hear and determine National's claim. *Martin v. Hunter's Lessee, supra.* The judgment of the United States Court of Appeals for the Ninth Circuit must be reversed.

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January 10, 1985

Office-Supreme Court, U.S.
FILED
JAN 15 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-320

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES; and LODGE GRASS SCHOOL DISTRICT NO. 27,

Petitioners,

-v-

CROW TRIBE OF INDIANS; et al.,

Respondents.

BRIEF OF ELEVEN AMICI CURIAE STATES ON MERITS OF FIRST QUESTION AS TO WHICH THE PETITION FOR WRIT OF CERTIORARI WAS GRANTED.

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QUESTIONS AS TO WHICH THE PETITION FOR WRIT OF CERTIORARI WAS GRANTED

1. Whether there is a federal claim for relief against Indian tribal governments that unlawfully assert civil jurisdiction over non-Indians.

2. Whether the Tribal Court of the Crow Indian Reservation has jurisdiction over claims that involve the State of Montana (or its subdivisions), that arise on State-owned land, and that occur in connection with activities that are compelled or encouraged by State and Federal law or policy.

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST.....	2
SUMMARY OF ARGUMENT.....	3
ARGUMENT.....	6
I. JURISDICTION MAY BE INVOKED UNDER THE FEDERAL COMMON LAW DOCTRINE WHEN "UNIQUELY FEDERAL RIGHTS" ARE INVOLVED WHOSE PROTECTION DEMANDS A UNIFORM FEDERAL RULE OF DECISION. MOREOVER, UNDER TRADITIONAL STANDARDS FEDERAL QUESTION JURISDICTION IS PRESENT WHEN THE PLAINTIFF'S CLAIM DEPENDS SIGNIFICANTLY UPON THE CONSTRUCTION AND APPLICATION OF FEDERAL TREATIES OR STATUTES.....	6
II. THE SCOPE OF TRIBAL SOVEREIGNTY HAS UNIFORMLY BEEN DETERMINED ON THE BASIS OF FEDERAL TREATIES, STATUTES AND EXECUTIVE BRANCH POLICIES, AND THE AMENDED COMPLAINT THUS PRESENTS A FEDERAL QUESTION UNDER THE "WELL-PLEADED COMPLAINT" RULE. THE COURT'S DECISIONS FURTHER REFLECT THE UNIQUELY FEDERAL NATURE OF TRIBAL	

TABLE OF CONTENTS
(Cont.)

Page

SOVEREIGNTY RIGHTS AND THE NEED FOR A FEDERAL RULE OF DECISION TO DETERMINE THEIR SCOPE, THEREBY WARRANTING IMPLICATION OF A FEDERAL COMMON LAW CAUSE OF ACTION EVEN IF SECTION 1331 JURISDICTION WERE ABSENT UNDER TRADITIONAL STANDARDS..... 19

CONCLUSION..... 40

TABLE OF AUTHORITIES

CASES

Page

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)..... 7

Illinois v. City of Milwaukee, 406 U.S. 91 (1972)..... 10

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)..... 33,34

Montana v. United States, 450 U.S. 544 (1981)..... 4,20, 28,32, 35,37,

Milwaukee v. Illinois, 451 U.S. 304 (1981)..... 20

Northwest Airlines v. Transport Workers Union, 451 U.S. 77 (1981)..... 9

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)..... 21,22, 24,25 34

Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974)..... 5,12, 16,17, 18,19, 21,39

Table of Authorities
(Cont.)

	Page
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).....	21
Shaw v. Delta Air Lines, 103 S. Ct. 2890 (1983)...	38
Taylor v. Anderson, 234 U.S. 74 (1914).....	14
Texas Industries v. Radcliffe Materials, 451 U.S. 630 (1981).....	7,11
United States v. Forness, 125 F.2d 928 (2d Cir.), cert. denied, 316 U.S. 694 (1942).....	14
United States v. Little Lake Misere Land Company, 412 U.S. 580 (1973).....	9
Washington v. Confederated Tribes of Colville, 447 U.S. 134 (1980).....	27
Wheeler v. United States, 435 U.S. 313 (1978).....	25,26
Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979).....	16,18 19

Table of Authorities
(Cont.)

	Page
OTHER AUTHORITIES	
Crow Allotment Act of 1920 41 Stat. 751.....	29,35
Fort Laramie Treaty of 1868,..	28,34
General Allotment Act of 1887 24 Stat. 1388.....	29,35
Nonintercourse Act 1 Stat. 137 (1790).....	12,15
Sherman and Clayton Acts, 15 U.S.C. §§ 1 et seq. (1973).....	7
United States Code	
18 U.S.C. § 1152 (1966)..	26
28 U.S.C. § 1331 (1966)..	3,5, 10,12, 13,19, 38,40
28 U.S.C. § 1345 (1976)..	20
28 U.S.C. § 1362 (1976)..	13
United States Supreme Court Rules	
Rule 36.4.....	1

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Respondents.

BRIEF OF ELEVEN *AMICI CURIAE* STATES ON MERITS OF FIRST QUESTION AS TO WHICH THE PETITION FOR WRIT OF CERTIORARI WAS GRANTED.

The States of Alaska, Arizona, Idaho, Minnesota, Montana, New Mexico, North Carolina, Oklahoma, South Dakota, Wisconsin and Wyoming respectfully submit pursuant to Sup. Ct. R. 36.4, as *amici curiae*, a brief on the merits of the first issue as to which certiorari has been granted.

STATEMENT OF INTEREST

The amici curiae States submitted a brief in support of the petition for writ of certiorari in this matter, and the statement of interest set out therein remains accurate. Briefly restated, the amici States carry on various governmental functions within the exterior boundaries of many Indian reservations. Those functions necessitate continuing and diverse interaction between the amici States, tribes and tribal members on fee lands owned by nonmembers, including the States or their political subdivisions, and on lands owned by tribal members, tribes or the United States government in its trust capacity. Because of the degree and regularity of such interaction, protection of the amici States' interests

demands the availability of a federal forum to determine, when appropriate, the scope of tribal civil adjudicatory authority. The absence of federal question jurisdiction under 28 U.S.C. § 1331 (1966) will leave the amici States with no independent means of challenging such authority except when a tribal court judgment is sought to be enforced in state court against them. The amici States will thus have no protection against enforcement of tribal court judgments as to their property within the exterior boundaries of reservations--the situation presented in this matter.

SUMMARY OF ARGUMENT

The Court's modern analysis of tribal sovereignty rights has typically involved a comprehensive review of relevant federal treaties, statutes and

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executive branch policies. In none of these cases has the sovereignty issue been directly resolved by a particular treaty or statute, and the Court has therefore been required to engage in a careful balancing of tribal and federal interests. Through such analysis the Court has arrived at general principles, perhaps most fully summarized in Montana v. United States, 450 U.S. 544 (1981), which apply to determination of sovereignty issues, including resolution of civil adjudicatory jurisdiction questions. Such determinations thus entail an analysis which, while based in treaty and statutory construction, contains a substantial measure of judicially-created standards.

Because of the hybrid analytical nature of tribal sovereignty right determinations, the existence of a

federal question under 28 U.S.C. § 1331 may be justified under the federal common law doctrine or on more typical jurisdictional grounds. The unique federal interest in the rights of tribes, when joined with the virtually complete occupation of Indian law by federal principles, demands a federal rule of decision, and there is no statutory or other basis to preclude creation of such a common law right. Moreover, Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974), clearly suggests that recognition of a federal common law claim under the circumstances herein is appropriate and that, in any event, federal question jurisdiction is present on traditional grounds because the Crow Tribe's sovereignty rights must be delineated through construction and application of federal treaties, statutes

and executive branch policies. Federal question jurisdiction should therefore be found. Finally, this brief does not address the question of whether the Crow Tribal Court did have jurisdiction over the petitioner Lodge Grass School District, but does suggest some considerations relevant to that issue and reflective of the federal question raised by the petitioners' amended complaint.

ARGUMENT

I. JURISDICTION MAY BE INVOKED UNDER THE FEDERAL COMMON LAW DOCTRINE WHEN "UNIQUELY FEDERAL RIGHTS" ARE INVOLVED WHOSE PROTECTION DEMANDS A UNIFORM FEDERAL RULE OF DECISION. MOREOVER, UNDER TRADITIONAL STANDARDS FEDERAL QUESTION JURISDICTION IS PRESENT WHEN THE PLAINTIFF'S CLAIM DEPENDS SIGNIFICANTLY UPON THE CONSTRUCTION AND APPLICATION OF FEDERAL TREATIES OR STATUTES.

The Court has outlined, in various cases, the broad parameters of the federal common law doctrine as it exists

subsequent to Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). Recently in Texas Industries v. Radcliffe Materials, 451 U.S. 630 (1981), it was asked to create a federal common law right of contribution on behalf of a defendant, who had been assessed damages under the Sherman and Clayton Acts, 15 U.S.C. §§ 1 et seq. (1973), against other participants in the unlawful conspiracy. The Court initially observed:

> There is, of course, "no federal general common law."... Nevertheless, the Court has recognized the need and authority in some limited areas to formulate what has come to be known as "federal common law."... These instances are "few and restricted" ... and fall into essentially two categories: Those in which a federal rule of decision is "necessary to protect uniquely federal interests,"...and those in which Congress has given the courts the power to develop substantive law....

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Id. at 640 (citations omitted). With respect to the "unique federal interests" aspect of the federal common law doctrine, the Court stated that, "absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." Id. at 641. In such cases state law is inapplicable "either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international character of the controversy makes it inappropriate for state law to control." Ibid. While recognizing that a general

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federal interest existed in private enforcement of the antitrust laws, the Court concluded: "Notwithstanding that nexus contribution among antitrust wrongdoers does not involve the duties of the Federal Government, the distribution of powers in our federal system, or matters necessarily subject to federal control even in the absence of statutory authority...." Id. at 641 (citation omitted). See Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 95 (1981).

The federal common law doctrine may further serve, as to unique areas of federal concern and regulation, "'to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress." United States v. Little Lake Misere Land Company, 412 U.S. 580, 593 (1973). Importantly, moreover,

federal common law not only determines choice of law but also creates a substantive cause of action to which federal jurisdiction attaches. The Court has accordingly construed the term "laws" in 28 U.S.C. § 1331 to include claims based upon federal common law as well as those of statutory origin. Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972).

The federal common law doctrine is, therefore, an established means for insuring protection of particularly federal concerns through availability of a federal forum and application of such law as determined appropriate by that forum. This doctrine has obvious significance to Indian law generally, which developed from conceptualizing

tribes as "domestic dependent nations" [1/] subject to the plenary authority of the federal government [2/] and largely free from interference by the several states.[3/] The analogous nature of Indian law and international law is evident.[4/] Those considerations which warranted the Court's refusal to recognize a federal common claim in Texas Industries thus strongly militate toward the opposite result as to claims like the petitioners'.

1/ Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831); United States v. Kagama, 118 U.S. 375, 384-85 (1886).

2/ Lone Wolf v. Hitchcock, 187 U.S. 553, 564-65 (1903).

3/ Worchester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832); Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685, 690 (1965); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144-45 (1980).

4/ Washington v. Washington State Commercial Passenger Fishing Vessel

While the Court has not explicitly applied the federal common law doctrine in an Indian law context, Oneida Indian Nation v. County of Oneida, supra, underscores the uniquely federal nature of Indian rights and lays an analytical foundation for implication of that doctrine herein as well as for jurisdiction under traditional federal question criteria. In Oneida, jurisdiction under 28 U.S.C. §§ 1331 and 1362 was found as to a complaint alleging that a 1795 cession of tribal land to the State of New York was ineffective because of noncompliance with the Nonintercourse Act, 1 Stat. 137 (1790), and because such cession was "for an unconscionable and

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(Footnote Continued)
Ass'n, 443 U.S. 658, 675 (1979). See, also, Tenneco Oil Co. v. Sac & Fox Tribe, 725 F.2d 572, 575 (10th Cir. 1984).

inadequate price." 414 U.S. at 664-65. Reversing the Court of Appeals' dismissal of the complaint for lack of jurisdiction, the Court first noted that the Oneida Nation's right to possession of the ceded lands "was plainly enough alleged to be based on federal law" since, "[g]iven the nature and source of possessory rights of Indian tribes to their aboriginal lands, particularly when confirmed by treaty, it is plain that the complaint asserted a controversy arising under the Constitution, laws or treaties of the United States within the meaning of both section 1331 and 1362." Id. at 666, 667.

The Court then reviewed the development of the "Indian title" doctrine under which title to tribal lands "is a matter of federal law and can be extinguished only with federal

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consent." Id. at 670. Tracing the use of such doctrine with respect to New York tribes, the Court cited with approval United States v. Forness, 125 F.2d 928 (2d Cir.), cert. denied, 316 U.S. 694 (1942), where state law was held inapplicable to an action brought by the United States to set aside certain reservation leases for nonpayment of rent and which concluded, as summarized by the Court, that, "absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law." Id. at 674 (footnote omitted). Nonetheless, rather than explicitly resting federal jurisdiction on implication of a federal common law cause of action, the Court reasoned that the action fell within the "well-pleaded complaint" rule of, inter alia, Taylor v. Anderson, 234 U.S. 74

(1914), because "the right to possession itself is claimed to arise under federal law in the first instance" and because the complaint satisfied "the additional requirement formulated in some cases" that the claim present a dispute over the construction or effect of federal law, since (1) the Oneidas asserted a right to present occupancy "based in part on their aboriginal right of occupancy which was not terminable except by act of the United States," and (2) they asserted a claim under the Nonintercourse Act "which put in statutory form what was or came to be the accepted rule--that the extinguishment of Indian title required the consent of the United States." Id. at 677, 678.[5/]

[5/] The Second Circuit Court of Appeals subsequently determined in Oneida that a federal common law claim to recover

Following Oneida, the Court again confronted a choice of law issue, similar to that involved in implication of a federal common law right of action, in Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979). Wilson presented the question of whether a tribe was entitled to possession of a land affected by avulsive movements of the Missouri River. As originally established, the Omaha Reservation was bounded on the east by

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(Footnote Continued)
damages for wrongful possession of tribal land does exist. Oneida Indian Nation v. County of Oneida, 719 F.2d 525, 530 (1983), cert. granted, 104 S. Ct. 1590 (1984). The court of appeals stated that "[t]he interrelationship of the Indian nations and the United States -- including its constituent states -- early in the new nation's history was recognized as involving uniquely federal interests." Ibid. Its holding was in part based on this Court's favorable reference to United States v. Forness, supra, and that decision's application of federal common law.

the Missouri River but, because of riverbed changes, land originally part of the reservation now rested on the east side of the river. The Court distinguished the Omahas' rights from those of non-Indian federal grantees because, citing Oneida, "the Indians' right to the property depends on federal law, 'wholly apart from the application of state law principles which normally and separately protect a valid right of possession.'..." Id. at 670. The Court nonetheless held that, while federal law governed, resort to uniform federal principles was unnecessary since (1) no uniform national rule to determine whether riparian changes were avulsive or accretive was required; (2) little likelihood of injury to federal trust responsibilities or tribal possessory interests existed if state law was

equitably applied by federal courts; and (3) states possessed a substantial interest in having their own laws resolve such controversies. Id. at 673-74. Thus, although the Court determined that the rule of decision should be supplied by state law, it carefully assured the availability of a federal forum to interpret and apply such law.

Oneida and Wilson underscore the unique nature of Indian possessory rights to land and provide a clear basis for implication of a federal common law cause of action with respect to determination of such rights. Oneida, moreover, sets forth a more traditional analysis of federal question jurisdiction, and that analysis has obvious application herein. As developed below, the scope of tribal sovereignty rights is, like tribal possessory rights to land, a unique

matter of federal concern and is, again like tribal possessory rights to land, fashioned with reference to, inter alia, federal treaties and statutes. Oneida and Wilson, when viewed with the federal common law doctrine, provide not only an analytical framework for resolving the federal question issue herein but also strongly suggest the presence of such jurisdiction.

II. THE SCOPE OF TRIBAL SOVEREIGNTY HAS UNIFORMLY BEEN DETERMINED ON THE BASIS OF FEDERAL TREATIES, STATUTES AND EXECUTIVE BRANCH POLICIES, AND THE AMENDED COMPLAINT THUS PRESENTS A FEDERAL QUESTION UNDER THE "WELL-PLEADED COMPLAINT" RULE. THE COURT'S DECISIONS FURTHER REFLECT THE UNIQUELY FEDERAL NATURE OF TRIBAL SOVEREIGNTY RIGHTS AND THE NEED FOR A FEDERAL RULE OF DECISION TO DETERMINE THEIR SCOPE, THEREBY WARRANTING IMPLICATION OF A FEDERAL COMMON LAW CAUSE OF ACTION EVEN IF SECTION 1331 JURISDICTION WERE ABSENT UNDER TRADITIONAL STANDARDS.

In finding federal question jurisdiction under 28 U.S.C. § 1331, the

District Court below stated that the amended complaint "places at issue the extent of tribal court civil jurisdiction over non-Indians developed by the Supreme Court in Montana v. U.S...--developments that are not drawn from any specific statute or treaty, but raise the overriding federal interest in determining the extent of tribal sovereignty and therefore form part of federal common law." (Petition at 17a.) The Court of Appeals, however, distinguished Montana v. United States, supra, because: (1) Jurisdiction for that action was expressly based on 28 U.S.C. § 1345 (1976) and (2) "Montana involved limitations of an Indian tribe's regulatory jurisdiction,..." (Id. at 6a.) It then refused to imply a federal common law claim, citing Milwaukee v. Illinois, 451 U.S. 304 (1981), for the principle

that "recognition of a cause of action arising from federal common law is an unusual course to be approached cautiously" and Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), for the notion that Congress intended "to limit intrusion of federal courts upon tribal adjudication." (Id. at 7a.) The Court apparently did not consider whether jurisdiction was present under the more traditional federal question analysis of Oneida or like decisions. While the Court of Appeals' preemptory reasoning perhaps resulted from the absence of challenge to federal question jurisdiction by the respondents, it nonetheless reflected an insensitivity to this Court's decisions beginning, most notably, with Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), which have defined the scope of tribal

sovereignty rights in varied situations. These decisions not only establish clearly the federally-controlled nature of the required sovereignty analysis but also the treaty and statutory basis of that analysis.

In Oliphant v. Suquamish Indian Tribe, supra, the Court held, in the context of a habeas corpus proceeding, that a nonmember could not be criminally prosecuted under a tribal code. It rejected the tribe's argument that authority over nonmembers derived from retained, inherent powers of government, reasoning that, while "Indian tribes do retain elements of 'quasi-sovereign' authority after ceding their lands to the United States and announcing their dependence on the Federal Government..., the tribe's retained powers are not such that they are limited only by specific

restrictions in treaties or congressional enactments.... Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their status'...." 435 U.S. at 208 (citations omitted; emphasis in original). The Court then concluded that exercise of criminal jurisdiction over non-Indians was inconsistent with such dependent status because the "power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty" and, "[b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily gave up their power to try non-Indian citizens of the United States, except in a manner acceptable to the Congress." Id. at 210.

Significantly, Oliphant's holding, like those in later sovereignty cases, was reached only after a subtle and detailed analysis of varied treaties, federal statutes, executive branch policies and judicial decisions which, in the aggregate, form "Indian law." Id. at 206. The decision thus traced the development of tribal court systems generally; the "relatively new phenomenon" of attempted assertion of criminal jurisdiction over non-Indians; the early congressional, executive and judicial assumption that such jurisdiction did not exist; and the Treaty of Point Elliot involving the Suquamish Tribe itself. This form of analysis is distinctive in American jurisprudence and underscores the unique relationship between Indian tribes and the federal government -- a relationship

whose legal nuances can be captured only through a sensitive treatment of changing legislative and executive approaches to particular Indian issues.

Less than a month after Oliphant, the Court again addressed the scope of inherent tribal sovereignty. In Wheeler v. United States, 435 U.S. 313 (1978), it found no violation of the Double Jeopardy Clause when a Navajo member, who had been convicted of certain offenses under the Navajo Tribal Code, was later prosecuted in federal court on the basis of the same transaction. The Court considered controlling the question of whether the power of the Navajo Tribe to punish the criminal conduct of its members derived from the tribe's inherent sovereignty or from delegation by Congress. Id. at 322. In determining that such power was inherent, the Court reviewed the treaties

executed between the tribe and the United States, 18 U.S.C. § 1152 (1966), which recognizes the right of tribes to prosecute their members, and general decisionally-based limitations on Indian sovereignty which rest "on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations." Id. at 328. "Internal criminal laws," however, were viewed differently because "[t]hey involved only the relations among members of tribe." Ibid. Wheeler's importance to the jurisdictional issue herein is the quality and nature of its reasoning, which resolved a difficult, elusive question by reference to that complex of treaties, statutes and decisional authority constituting "Indian law."

A tribe's authority as to consensual, on-reservation purchases by nonmembers was a principal issue in Washington v. Confederated Tribes of Colville, 447 U.S. 134 (1980). The Court rejected the State of Washington's challenge to that authority, noting: "Executive branch officials have consistently recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest...including jurisdiction to tax" and that "[f]ederal courts have also acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activity." Id. at 152-53 (citations omitted). The Court then stated that "[t]ribal powers are not implicitly divested by virtue of the

tribes' dependent status" but that "such a divestiture [has been found] where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government." Id. at 153. Implicit in the "overriding National Government interests" standard is, of course, a balancing of tribal and federal interests, as reflected through the constitution, treaties, statutes, executive branch policies and decisional authority.

In Montana v. United States, supra, the attempted assertion of control by the Crow Tribe over nonmember hunting and fishing on, inter alia, fee land owned by nonmembers was held outside the Tribe's sovereignty rights. The Court initially rejected the Ninth Circuit's reliance on the Fort Laramie Treaty of 1868 as basis for the authority claimed by the Tribe,

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reasoning that, while the treaty provided for lands to be "set apart for the absolute and undisturbed use and occupancy of the Indians," the Tribe was impliedly not given authority over lands not subject to such exclusive use and occupancy. 450 U.S. at 558-59. The Court further rejected the court of appeals' conclusion concerning the effect of the General Allotment Act of 1887, 24 Stat. 1388, and the Crow Allotment Act of 1920, 41 Stat. 751, and stated that, after review of the legislative and executive assimilation policy underlying those statutes, "[i]t defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate

destruction of tribal government." Id. at 599 n.9.

The Court further held that the Tribe's inherent authority was "not so broad" as to support hunting and fishing regulation of nonmembers on nontribal fee lands. It stated that such authority had normally been limited to matters of internal concern involving tribal members, and that "the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." Id. at 564 (citations omitted). Regulation of hunting and fishing by nonmembers on nontribal land, however, was then characterized as having "no clear relationship to tribal self-government or

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internal relations." Ibid. Most importantly for present purposes, the Court noted that tribes may retain "inherent sovereign powers to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands," citing as examples activity by nonmembers who have entered into a consensual relationship with the tribe or its members and activity of nonmembers which "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Id. at 566 (citations omitted; emphasis added). The Court found no consensual relationship and no threat to the Tribe's political or economic

security with respect to the nonmembers' hunting and fishing.[6/]

Montana thus continued the analytical methodology used in prior decisions to determine the scope of

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[6/] The Court's reference to "civil jurisdiction" is, in itself, sufficient to vitiate the Court of Appeals' distinction below between "regulatory" and "adjudicatory" jurisdiction. (Petition at 6a-7a.) Indeed, two decisions cited by the Court in Montana for the "direct effect" test, Fisher v. District Court, 424 U.S. 382 (1976), and Williams v. Lee, 358 U.S. 217 (1959), upheld the exclusivity of tribal court proceedings and involved no "regulatory" aspects. Judge Wright's remark in his dissent that the majority's "distinction cannot be found in the cases and rests upon a strained reading of their facts" is clearly well-taken. Realistically viewed, such distinction derived not from a reasoned analysis of this Court's decisions but from prior Ninth Circuit holdings recognizing federal common law jurisdiction over claims, in a "regulatory" context, that tribal sovereignty rights have been exceeded. Babbitt Ford v. Navajo Indian Tribe, 710 F.2d 587, 591 (1983), cert. denied, 104 S. Ct. 1707 (1984); Cardin v. De La Cruz, 671 F.2d 363, 365, cert. denied, 459 U.S. 967 (1982).

tribal sovereignty. That methodology requires discrete analysis not only of the treaties, statutes and executive policies directly relevant to the tribal-federal government relationship at issue but also of more general concepts of tribal sovereignty whose basic parameters have been articulated through earlier cases. The methodology was most recently applied in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), where the validity of a tribal oil and gas tax on nonmember lessee producers was sustained. The tribe's power to tax was found to be "an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management...[and] derives from the tribe's general authority, as sovereign, to control economic activity within its

jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." Id. at 137 (citation omitted). The Court premised this conclusion on longstanding executive and legislative recognition of tribal taxation authority. Id. at 139-41.

The Court's decisions from Oliphant through Merrion unequivocally establish that determination of the scope of tribal sovereignty turns on a close analysis of relevant treaties, statutes and executive branch policies. Thus, in this matter the scope of the Crow Tribal Court's authority must be resolved by considering issues such as: (1) whether the 1868 Fort Laramie Treaty provides any basis for the asserted jurisdiction or, if as

in Montana, that treaty, when considered in pari materia with the 1887 General Allotment Act and the 1920 Crow Allotment Act, evinces an intent generally to limit tribal civil jurisdiction to members; (2) relevant executive branch policies or regulations as to the scope of tribal court civil jurisdiction;[7/] (3) whether, in view of general sovereign immunity principles, the Tribe's dependent status

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7/ The civil jurisdiction of Courts of Indian Offenses has generally been limited to disputes between tribal members or disputes between tribal members and nonmembers "brought before the courts by stipulation of both parties." 25 C.F.R. § 11.22 (1984). Although the Crow Tribe, through implementation of its own tribal court system, displaced its Court of Indian Offenses (25 C.F.R. § 11.1(d)), a similar limitation on jurisdiction existed as to the prior Crow court. 25 C.F.R. § 11.22C. Thus, as in Montana with respect to hunting and fishing regulation, there appears no established history of tribal court jurisdiction over nonmembers absent consent.

is consistent with investing it with the power to adjudicate claims against a political subdivision of the state without such subdivision's consent and without the availability of federal review as to the merits of such adjudication;[8/] and (4) whether, as the

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[8/] At common law states and their political subdivisions were immune from liability for tortious conduct by their employees, although a liability distinction was sometimes drawn, with respect to municipal corporations, between "governmental" and "proprietary" functions. See generally, T. Cooley, Law of Torts, §§ 72, 388 (4th ed. 1932); F. Harper & F. James, Law of Torts §§ 29.4-29.6 (1956). Even if the governmental and proprietary distinction was recognized for present purposes, the activity relating to the injury was governmental. There has been, in this regard, no contention by the respondents that Montana statutes permitting state court actions for tortious conduct by state and local government employees constitutes waiver of sovereign immunity for tribal court purposes. See §§ 2-9-102, 2-9-311, MCA; cf. State Peretti, 661 F.2d 756, 758 (9th Cir. 1981), (per curiam) (state may waive immunity as to state court actions

district court concluded below, Montana's "direct effect" test governs determination of this case. While not exhaustive of the factors which may be deemed material, each of the above issues is directly concerned with the interpretation and application of federal treaties, statutes, executive branch policies or decisional law and represents the nature of the inquiry essential to determining the scope of the Tribal Court's jurisdiction herein.[9/]

(Footnote Continued)
without waiving Eleventh Amendment immunity in federal courts).

[9/] The Court of Appeals' conclusory assertion below that implication of a federal common law claim would interfere with the Tribe's self-government rights under the Indians Civil Rights Act of 1968, 25 U.S.C. § 1301 et seq. (1983) ("ICRA"), begs the central question. The issue is whether the asserted right of self-government exists and, whatever else the ICRA may stand for, it is manifestly not intended to preclude federal

In sum, the petitioners' complaint clearly presents a federal question ripe for adjudication under 28 U.S.C. § 1331 because at its core lies petitioner Lodge Grass School District's claimed right to be free from tribal court jurisdiction absent consent. Cf. Shaw v. Delta Air Lines, 103 S. Ct. 2890, 2899 n.14 (1983) (§ 1331 jurisdiction present as to claim that state regulation was preempted by federal law). The precise contours of the alleged right must be traced with reference to federal treaties, statutes

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(Footnote Continued)
determination of that issue. In relevant part, the ICRA imposes certain obligations on tribes which had previously not existed and provides, as construed by Santa Clara Pueblo v. Martinez, supra, for highly restricted review of whether those rights have been violated. There is nothing in the ICRA or Santa Clara which indicates the statute was designed to broaden the substantive scope of tribal governance rights existing as of its enactment.

and executive branch policies, as construed by the Court in various decisions. Clearly, the petitioners' claim that the Lodge Grass School District, under the facts presented, has a federal right against nonconsensual assertion of Tribal Court jurisdiction "cannot be said to be so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to include a federal controversy within the jurisdiction of the district court, whatever may be the ultimate resolution of the federal issues on the merits." Oneida Indian Nation v. County of Oneida, 414 U.S. at 666-67. The petitioners' claim also undeniably involves a matter of unique federal concern, is incontrovertibly controlled by federal law, demands the availability of a

federal forum for its adjudication and is therefore appropriate for treatment under the federal common law doctrine.

CONCLUSION

The amici curiae States respectfully request that the Court find federal question jurisdiction under 18 U.S.C. § 1331 as to the petitioners' complaint and reverse the Court of Appeals' determination on that issue.

Respectfully submitted January, 1985.

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PETITIONER'S

BRIEF

Office-Supreme Court, U.S.
FILED
JAN 18 1985
L. STEVAS,
CLERK

No. 84-320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES; AND LODGE GRASS SCHOOL DISTRICT NO. 27,

Petitioners,

v.

CROW TRIBE OF INDIANS; LEROY SAGE, A MINOR; FLORA NOT AFRAID, HIS GUARDIAN; THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; EDDIE ROUNDFACE, GLEN BIRDINGROUND, AND IRA LEFTHAND, JUDGES OF THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; CROW INDIAN TRIBAL COUNCIL; AND DONALD STUART, CHAIRMAN OF THE CROW INDIAN TRIBAL COUNCIL,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether there is a federal claim for relief against Indian Tribal Governments that unlawfully assert civil jurisdiction over non-Indians.
2. Whether the Tribal Court of the Crow Indian reservation has jurisdiction over claims that involve the state of Montana (or its subdivisions), that arise on state owned land, and that occur in connection with activities that are compelled or encouraged by state and federal law or policy.

PARTIES TO THE PROCEEDINGS BELOW

The petitioners are the Lodge School District No. 27 and its insurer, National Farmers Union Insurance Companies. These parties were the plaintiffs in No. CV-82-230-BLGS, which was the original proceeding brought in the United States District Court for the District of Montana, Billings Division and were the respondents in No. 83-3606 the appeal of said action before the United States Court of Appeals for the Ninth Circuit. The respondents, all defendants in No. CV-82-230 and appellants in the subsequent Ninth Circuit Court of Appeals case, are: CROW TRIBE OF INDIANS; LEROY SAGE, A MINOR; FLORA NOT AFRAID, HIS GUARDIAN; THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; EDDIE ROUNDFACE, GLEN BIRDINGROUND, AND IRA LEFTHAND, JUDGES OF THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; CROW INDIAN TRIBAL COUNCIL; AND DONALD STUART, CHAIRMAN OF THE CROW INDIAN TRIBAL COUNCIL.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING BELOW	ii
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. Tribal Court Judgments are subject to Federal Court Review for Claims of Jurisdictional Excess	8
A. The Ninth Circuit Erred in Holding that There is Not a Federal Right of Relief for Non-Indians Claiming Abuse of Tribal Court Jurisdiction.	8
B. Neither the Indian Civil Rights nor this Court's Decision in *Santa Clara Pueblo* v. *Martinez* bars Federal Court Jurisdiction Over Non-Indian's Challenges to Tribal Court Jurisdiction.	15
II. The District Court properly held that under the facts of this case, the Crow Tribal Court was without jurisdiction over the Lodge Grass School District and that the Tribal Court Judgment was unlawfully entered.	18
CONCLUSION	22

TABLE OF AUTHORITIES

CASES: Page

Babbit Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1707 (1984) 8, 13, 14

Cardin v. De La Cruz, 671 F.2d 363 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982) 8, 13, 14

Illinois v. City of Milwaukee, 406 U.S. 91 (1972) ..... *passim*

Milwaukee v. Illinois, 451 U.S. 304 (1981) 9, 10

Montana v. United States, 450 U.S. 544 (1981) ..... *passim*

Muckleshoot Tribe v. Trans-Canada Enterprises, 634 F.2d 474 (9th Cir. 1980) 12, 13

Oliphant v. Suquamish Indian Tribe, 425 U.S. 191 (1978) ..... *passim*

Puyallup Tribe, Inc. v. Department of Game, 443 U.S. 165 (1977) 17

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1977) ..... *passim*

Snow v. Quinalt Indian Nation, 709 F.2d 1319 (9th Cir. 1983), *cert. denied*, ___ U.S.___, 104 S.Ct. 2655 (1984) 11, 12

STATUTES, TREATIES AND CONSTITUTIONAL PROVISIONS:

28 United States Code:
§1254(1) 2
§1331 ..... *passim*

Indian Civil Rights Act of 1968, 25 U.S.C. §§1301–1303: 15

Crow Allotment Act of 1920 §16 ..... 4, 20

Montana Codes Annotated:
2-9-311 21
2-9-316 21
2-9-318 ..... 3, 21

Montana State Constitution:
Article II, §18 21

MISCELLANEOUS:

Brief of Navajo Tribe of Indians, *Kerr-McGee v. Navajo Tribe of Indians* (9th Cir. 1984), *cert. granted*, October, 1984, No. 84-68, *argument pending* 18

Kappler, *Indian Affairs: Laws and Treaties*, Vol. IV 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-320

NATIONAL FARMERS UNION INSURANCE COMPANIES: AND LODGE GRASS SCHOOL DISTRICT NO. 27,

Petitioners,

v.

CROW TRIBE OF INDIANS; LEROY SAGE, A MINOR; FLORA NOT AFRAID, HIS GUARDIAN; THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; EDDIE ROUNDFACE, GLEN BIRDINGROUND, AND IRA LEFTHAND, JUDGES OF THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; CROW INDIAN TRIBAL COUNCIL; AND DONALD STUART, CHAIRMAN OF THE CROW INDIAN TRIBAL COUNCIL,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 736 F.2d 1320 (1984) and is reproduced in the Appendix to the Petition at 1a. The opinion of the District Court for the District of Montana is reported at 560

F.Supp. 213 (1983) and is also reproduced in the Appendix to the Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on July 3, 1984. The Petition for Certiorari was timely filed with this Court on August 29, 1984. This Court granted certiorari as to both questions presented for review. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1)(1982).

2-9-316 MCA. JUDGMENTS AGAINST GOVERNMENTAL ENTITIES EXCEPT STATE. A political subdivision of the state shall satisfy a final judgment out of funds that may be available from the following sources:

(1) insurance;

(2) the general fund or any other funds legally available to the governing body;

(3) a property tax, othewise properly authorized by law, in an amount necessary to pay any unpaid portion of the judgment, except that such levy may not exceed 10 mills;

I. FEDERAL STATUTE

28 U.S.C. see 1331 provides in relevant part for jurisdiction in the Federal Courts over Civil Cause of Action that arise "under the constitutional laws, or treaties of the United States."

II. STATE STATUTES

MONTANA CODE ANNOTATED [HEREINAFTER MCA]:

(4) proceeds from the sale of bonds issued by a county, city, or *school district* for the purpose of deriving revenue for the payment of the judgment liability. The governing body of a county, city, or school district is hereby authorized to issue such bonds pursuant to procedures established by law. Property taxes may be levied to amortize such bonds, provided the levy for payment of any such bonds or judgment may not exceed, in the aggregate, 10 mills annually.

2-9-318 MCA. ATTACHMENT AND EXECUTION. No levy of attachment or writ of execution shall issue against any property of a governmental entity for the security or collection of any claim or judgment against any governmental entity under Parts 1 through 3 of this matter.

STATEMENT OF THE CASE

This case involves the question of whether the United States District Court for the District of Montana properly entertained jurisdiction pursuant to 28 U.S.C. §1331 to determine under the facts of the case at bar whether the Tribal Court of the Crow Indian Reservation unlawfully asserted civil jurisdiction over a political subdivision of the State of Montana in a tort case.

The controversy arose on May 27, 1982, when Leroy Sage, a minor enrolled member of the Crow Tribe of Indians was injured during a school day on the premises of an elementary school operated by Lodge Grass School District No. 27, which is a political subdivision of the State of Montana. The situs of the accident was on land owned by the State of Montana, with a mineral reservation therein held by the Crow Tribe. The land was sold to

Montana pursuant to the *Crow Allotment Act* of 1920 §16, which contains the following requirement:

> Provided further, that the Crow Indian children shall be permitted to attend the public schools of said state on the same condition as the children of white citizens of said state.

Kappler, *Indian Affairs: Laws and Treaties*, Vol. IV, p 277 (1928).

The undisputed facts of Leroy Sage's injuries and initial lawsuit are these as shown in the Excerpt of Record, filed with the 9th circuit Nos. 5, 13 & 24 [hereinafter "R"].

(a) Mr. Sage was struck by an uninsured motorcyclist on the school parking lot while returning from a school-sponsored activity;

(b) Mr. Sage suffered a broken leg for which medical bills, presently incurred and expected in the future, would total $3,000.00;

(c) Upon being contacted by Sage's attorney, the School District notified its insurer (National Farmers) of a claim by said attorney;

(d) As the adjuster for said insurer was investigating the claim, Sage, through his guardian, Flora Not Afraid, brought suit against the School District in Crow Tribal Court. The suit sought an award of $153,000.00 in damages ($150,000.00 pain and suffering, $3,000.00 actual and estimated total future medical expense);

(e) Process for the Tribal Court action was served by Dexter Falls Down on Wesley Falls Down, School Board Chairman for Lodge Grass School District No. 27. Wesley Falls Down utterly failed to notify the principal, secretary, superintendent or any other School District personnel or the District's insurer that suit had been filed and process accomplished;

(f) Because no one notified the carrier (National Farmers) of the pendency of the action, no preparation was possible for any defense of the Tribal Court lawsuit, and twenty-one days after service was made on Wesley Falls Down, the Tribal Court, without any notice having been given to the School District or to its insurer, entered a default judgment for the sum of $153,000.00 or the full prayer of the Tribal Court complaint.

Following these events, the School District and its insurer agreed to and did seek injunctive relief from the United States District Court for the District of Montana. They presented the above-stated facts to the Court in affidavits. Respondents, and all of them, brought forth not a single fact to rebut the facts of this case.

Judge James F. Battin issued a permanent injunction against all individual respondents to the effect that they were barred from attempting to enforce the default Tribal Court judgment. He did not rule upon Petitioner's claims of unconstitutional treatment (expressly leaving those issues for future resolution) but followed this Court's rule established in *Montana v. United States*, 450 U.S. 544 (1981), after finding he was empowered to invoke that rule pursuant to 28 U.S.C. §1331. In conducting the *Montana*, *supra*, analysis, Judge Battin held that since the tort at issue herein did not involve a consensual commerical transaction, the propriety of Tribal Court authority over the State of Montana would depend on whether Federal Court denial thereof would threaten the political integrity, the economic security, or the health or welfare of the Tribe as a whole. He concluded it did not and issued the injunction which Respondents appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit reversed Judge Battin and held that since a Tribal Court was the first and last arbiter of its own jurisdiction, 28 U.S.C. §1331 could never empower a Federal Court to intrude upon adjudicatory jurisdiction asserted by Tribal Courts even in civil tort actions involving non-Indians and arising upon non-Indian lands located within the boundaries of Indian reservations. The Ninth Circuit, however, envisioned that Sage would seek to enforce his Tribal Court judgment in State Court.

This did not occur, and without notice, the Tribal Court, upon application of Sage's attorney, authorized a surprise seizure of School District property to satisfy the Tribal Court judgment. Petitioners then applied for an emergency stay of the planned Tribal Court auction of said property, and such a stay was granted by Justice Rehnquist just as the sale was set.

Justice Rehnquist wrote an opinion extending the stay through the course of the instant appeal. He specifically left resolution of the question of a supersedeas bond demanded by Respondents, Sage and Not Afraid, to Judge Battin who ruled a bond was not required and that the seized property was to be returned to the School District on or before December 15, 1984. As this is written, Respondents continue to disobey Judge Battin's order, and contempt proceedings are underway.

SUMMARY OF ARGUMENT

The ability of States to conduct their governmental mandates in orderly fashion is at stake in this matter.

Local government is limited historically by constraints imposed upon it by State Constitutions and the highest law of the land, the United States Constitution. The

Ninth Circuit Court of Appeals in its opinion below has rendered history nugatory.

The Ninth Circuit fundamentally erred in holding that *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1977), (involving as it did an intra-tribal dispute) makes a Tribal Court the first and last arbiter of its own jurisdiction in tort cases involving State owned land and State-run activity. Questions of the existence and extent of Indian Tribes' jurisdiction over non-Indians involves a careful examination of Tribal sovereignty and the extent to which that sovereignty has been divested. That analysis demands detailed study of relevant statutes, treaties, and that area of federal case law dealing with Indian Tribes and their relations with other entities. That analysis is no different for questions concerning Tribal adjudicatory and Tribal regulatory assertions of authority over non-Indians. The study of such questions is not governed by any single federal statute, but is based on federal common law. A claim based on such federal common law is included in "laws" of the United States for purposes of federal jurisdictions under 28 U.S.C. sec. 1331. *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972) stands for the unassailable proposition that Petitioners stated a claim for federal judicial recognition of a cause of action arising under federal common law. The district court properly entertained jurisdiction pursuant to 28 §1331 U.S.C., to hear petitioner's cause of action. The Ninth Circuit perhaps more than any circuit court of appeals, has correctly recognized that cases challenging tribes' exercise of jurisdiction over non-Indians involves questions of Indian Sovereignty and are therefore subject to section 1331 jurisdiction. The district court also properly utilized this Court's holding in *Montana* v. *United States*, *supra*, to determine that under the facts in this case, the assertion

by the Crow Tribal Court of jurisdiction over a political subdivision of the State of Montana was not necessary to protect inherent Tribal sovereignty. Petitioners argue, moreover, that allowing the instrusion of the Tribal Court's asserted jurisdiction over a State Public School District would destroy the ability of the State of Montana to provide equal educational opportunities to Crow Indian children residing within the boundaries of the Lodge School District No. 27.

ARGUMENT

I. Tribal Court Judgments are Subject to Federal Court Review for Claims of Jurisdictional Excess.

A. The Ninth Circuit Erred in Holding That There Is Not A Federal Right of Relief for Non-Indians Claiming Abuse of Tribal Court Jurisdiction.

In the instant case [hereinafter, "*National Farmers Union Insurance*"], the Ninth Circuit court recognized that federal courts (including the Ninth Circuit itself) have appropriately decided questions of whether a tribe has exceeded its jurisdiction over non-Indians, citing *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 591 (9th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S. Ct. 1707 (1984); and *Cardin v. De La Cruz*, 671 F.2d 363, 365, *cert. denied*, 459 U.S. 967 (1982). *National Farmers Union Insurance* (Pet. App. 5a–6a). There is no federal statute defining the extent of tribal jurisdiction over non-Indians, yet the Ninth Circuit acknowledged that federal jurisdiction for such questions exists under 28 U.S.C. §1331,[1] based on principles and questions of federal common law. However, the Ninth Circuit sought to avoid its own previous recognition of federal question jurisdiction over challenges by non-Indians to tribal authority by saying that the cases recognizing such jurisdiction only dealt with challenges to tribal regulatory jurisdiction. The court noted that such federal court jurisdiction was an "unusual course, to be approached [so] cautiously" as to exclude the review of questions of whether a tribe has abused its adjudicatory jurisdiction. *National Farmers Union Insurance* (Pet. App. 7a), quoting *Milwaukee v. Illinois*, 451 U.S. 304, 312–14 (1981).

The limitation on federal question jurisdiction to causes of action arising from federal common law for tribal abuses of regulatory jurisdiction as opposed to tribal abuses of adjudicatory jurisdiction is based on a distinction made from whole cloth by the Ninth Circuit, and not recognized elsewhere. It is a distinction that would create unbridled power in tribal courts to issue judgments, whether or not the tribal courts have jurisdiction to do so, even while subjecting tribal legislative decisions to federal court scrutiny. The distinction allows no basis for review of tribal court judgments claimed to be in excess of tribal court jurisdiction. In order to conclude that section 1331 jurisdiction based on federal common law is such a rarity that it did not include questions of the existence of tribal courts to exercise jurisdiction over non-Indians, the Ninth Circuit completely ignored the rationale for judicial recognition of a cause of action arising under federal common law, as expressed in cases that *it* has decided on this basis, and as expressed by this Court in *Illinois v. City of Milwaukee*, 406 U.S. 91, 99–100 (1972).[2] and ignored the

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[1] 28 U.S.C. §1331 provides for jurisdiction in the federal courts over civil causes of actions that arise "under the Constitution, laws or treaties of the United States."

[2] In the instant case, the Ninth Circuit did not discuss *Illinois v. City of Milwaukee*, which held that "laws" of the United States in 28 U.S.C. §1331 include claims based on federal common law.

rationale for federal review of claims by non-Indians that tribal jurisdiction doesn't exist. The distinction between tribal regulatory and tribal adjudicatory action now seen by the Ninth Circuit in its earlier decisions was a distinction imposed only in hindsight. The Ninth Circuit concocted artificial reasons for concluding that this Court's decision in *Oliphant v. Suquamish Indian Tribe*, 425 U.S. 191 (1978), does not recognize federal review of tribal court judgments claimed to be in excess of tribal court jurisdiction.

Also, the Ninth Circuit failed to note that federal question jurisdiction based on common law was defeated in *Milwaukee v. Illinois*, *supra*, only because Congress passed comprehensive federal legislation covering the cause of action in that case after the cause of action had been filed in federal court. In holding that there was no federal question jurisdiction, this Court did not depart from its earlier holding in *Illinois v. City of Milwaukee* that for causes of action relying on federal common law, when there is no applicable act of Congress, federal question jurisdiction exists. Contrary to the Ninth Circuit's suggestion that *Milwaukee v. Illinois* supports a bar to federal court jurisdiction in the instant case (Pet. App. 7a), this Court in Milwaukee restated its commitment to its earlier holdings that federal common law exists in areas of national concern, and is resorted to in the absence of an applicable act of Congress, when the court is compelled to consider federal questions that cannot be answered from federal questions alone. 451 U.S. at 314 [citations omitted].

Seemingly more than any other circuit court of appeals the Ninth Circuit has previously recognized that there is federal jurisdiction over challenges by non-Indians to the existence of tribal jurisdiction. This recognition by the Ninth Circuit has been free from distinction between

regulatory and adjudicatory power. The basis for the federal jurisdiction has been that challenges to the existence of tribal power present questions of the extent of tribal sovereignty and jurisdiction that involve analyses of federal treaties, statutes and case law, and are sufficiently federal in nature to invoke federal jurisdiction pursuant to 28 U.S.C. §1331. For instance, the Ninth Circuit allowed a federal forum for non-Indians' challenge to the Quinault Indian Tribe's power to exercise jurisdiction over non-Indians, in *Snow v. Quinault Indian Nation*, 709 F.2d 1319 (9th Cir. 1983), *cert. denied*, ____ U.S. ____ 104, S. Ct. 2655 (1984). Although the Ninth Circuit held against the plaintiffs on the merits, the court agreed with the district court's holding in *Snow* that the issue of the existence of the tribal power was a question that arose under federal common law such that federal question jurisdiction under 28 U.S.C. §1331 existed. 709 F.2d at 1321. In *Snow*, the Ninth Circuit correctly stated that federal question jurisdiction can be based on case law, relying on *Illinois v. City of Milwaukee*, *supra*, and held that "[as] Snow's action raises the issue of *tribal sovereign powers*, a sufficient federal question is presented upon which to base section 1331 jurisdiction." *Ibid.* In *Snow*, the Ninth Circuit also relied on *Oliphant v. Suquamish Indian Tribe*, *supra*, and *Montana v. United States*, *supra*, for the conclusion that there was federal question jurisdiction under section 1331. 709 F.2d at [1321]. *Oliphant* was initiated by a petition for *habeas corpus* by a non-Indian who questioned tribal sovereign powers by challenging a tribal court's criminal jurisdiction to try and punish him. It was that issue of tribal sovereignty in *Oliphant* that the Ninth Circuit recognized in *Snow* as creating federal questions jurisdiction. 709 F.2d at [1321].[3] There is no distinction

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[3] Now, in the instant case, the Ninth Circuit insists that the 1977

made in *Snow* between challenges to regulatory tribal power and adjudicatory power of tribal courts insofar as they present a federal question for federal question jurisdiction purposes. Neither of the cases cited by the Ninth Circuit in *Snow* in support of the existence of federal questions jurisdiction—*Illinois v. City of Milwaukee*, *Oliphant*, or *Montana* suggests that any distinction could exist between challenges to regulatory as opposed to adjudicatory jurisdiction of tribes for purposes of federal question jurisdiction.

Also, in *Muckleshoot Tribe v. Trans-Canada Enterprises*, 634 F.2d 474 (9th Cir. 1980), the Ninth Circuit had recognized the existence of section 1331 jurisdiction when questions of the tribal sovereignty and authority over non-Indians were raised by a non-Indians plaintiff. In *Muckleshoot*, the plaintiff did not plead section 1331 jurisdiction, and the case was dismissed on the jurisdictional grounds that were pled. However, the Ninth Circuit specifically instructed the distict court to grant leave to amend the complaint on remand. 634 F.2d at 476 n. 4. As with other relevant Ninth Circuit decisions prior to the instant case, there is absolutely no hint of any distinction between questions of tribal regulatory authority and questions of tribal adjudicatory authority over non-Indians for purposes of federal question jurisdiction. After its decision in *Muckleshoot*, the Ninth Circuit reaffirmed that the instruction to the district court to allow an amendment to

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decision of this Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1977) (See part B, *Infra*), must be read together with *Oliphant* for the result that it was only the *habeas corpus* remedy sought in *Oliphant* that allowed for a federal forum, and that but for that peculiarity, there could have been no federal questions jurisdiction in that case. (Pet. App. 6a).

the complaint in *Muckleshoot* to include a section 1331 jurisdiction claim was an express recognition that challenges of tribal power over non-Indians presented a federal question for purposes of section 1331 jurisdiction, in *Babbitt Ford, Inc. v. Navajo Indian Tribe*, *supra*, 710 F.2d at 591. The specific challenge concerned a question of whether the Navajo Tribe has sovereign power to enact and enforce civil laws regulating the conduct of non-Indians who come into the reservaton to repossess vehicles. As with all of its cases dealing with this issue prior to the instant case, the Ninth Circuit failed to note any distinctions between federal court jurisdiction to consider adjudicatory and regulatory tribal power. In *Babbitt*, the Ninth Circuit discussed *Oliphant*, *supra*, in an analysis of the extent of the Navajo Tribe's sovereignty, 710 F.2d at 598, but did not take the opportunity in the discussion to suggest that the federal forum that considered the challenge to tribal court jurisdiction in *Oliphant* was available only because *Oliphant* came to the court on a petition for *habeas corpus*.

Nor did the Ninth Circuit note such a distinction in another case where it found federal question jurisdiction existed for a non-Indian's challenge to the existence of tribal authority over the non-Indian. *Cardin v. De La Cruz*, *supra*, In *Cardin*, the Ninth Circuit decided as a federal question the issue of whether the Quinault Tribe could enforce its economic and health and welfare regulations against a non-Indian grocer on the reservation. Again, it was the analysis of federal case law, statutes and treaties which determined the extent of tribal sovereignty. In perceiving a difference now, the Ninth Circuit ignores the fact *Cardin* was before the federal court on an action brought by a non-Indian seeking injunctive relief from the enforcement of a tribal court order obtained

against him by the tribe and seeking a ruling that such orders were beyond the tribe's jurisdiction.

In all of the Ninth Circuit cases decided prior to its decision in the instant case, the court analyzed the question of whether the challenged tribal authority over the non-Indian existed by analyzing the extent of tribal sovereignty in each case. That analysis involved detailed study of a tribe's inherent sovereignty and its possible divestiture by looking at the relevant treaties, statutes, executive policies, and federal case law on Indian questions. In each case, the Court's analysis followed the type of analysis used in *Oliphant*, *supra*, and in *Montana v. United States*, *supra*. In the referenced cases themselves, the Ninth Circuit had recognized that the same issues, questions and types of authority used by this Court in *Oliphant* and *Montana* were involved in the examination of the challenged tribal authority at issue over non-Indians. In fact, *Oliphant* and *Montana* seem to be the lodestar for the court's requisite analysis of tribal sovereignty in each case. *E.g.*, *Cardin*, *supra*, 671 F.2d at 366; *Babbitt*, *supra*.

The Ninth Circuit's conclusion that federal courts lack jurisdiction over the claim presented in the instant case is strained and erroneous. The analysis of tribal sovereignty that is part of every decision where federal courts accept jurisdiction over a non-Indian's challenge to the existence of tribal court authority involves a careful analysis of the source and extent of the sovereignty, based on a review of relevant statutes, treaties, executive policies and case law. The "federal interest in determining the extent of tribal sovereignty" was emphasized by the District Court in holding that federal question jurisdiction existed in the instant case. (Pet. App. 17a). This is the sort of analysis that is compelled by the question of the existence of tribal

jurisdiction over a non-Indian. It is the sort of analysis employed in part II *infra*, to examine the Crow Tribe's jurisdiction in the instant case. The question and analysis thereof are tailor made for federal common law, federal question jurisdiction.

Of course this Court has no obligation to follow decisions of the circuit courts, including the Ninth Circuit's earlier decisions, and that is not petitioners' suggestion in citing previous decisions of the Ninth Circuit. However, it is impossible not to notice that the analyses of tribal sovereignty in these cases are necessary to consider the existence or non-existence of tribal authority over non-Indians and are "spin-offs" of the *Oliphant* and *Montana* decisions. These examinations of tribal sovereignty, its origins, and whether it's been divested, are decided on the basis of federal common law. The sort of analysis required in this case, *Oliphant*, and in *Montana*, is precisely the sort of analysis that allows for federal question jurisdiction despite or because of the absence of any single federal statute or provision that defines the extent of tribal jurisdiction here.

B. Neither The Indian Civil Rights Act Nor This Court's Decision In *Santa Clara Pueblo v. Martinez* Bars Federal Court Jurisdiction Over Non-Indian's Challenges To Tribal Court Jurisdiction.

The Ninth Circuit declined to recognize any common law cause of action against Indian Tribes in addition to the remedy of *habeas corpus* available under the Indian Civil Rights Act of 1968, 25 U.S.C. §§1301–1303, based on an over-broad reading of *Santa Clara Pueblo v. Martinez*, *supra*. (Pet. App. 4a n.3, 6a, and 7a). In *Martinez*, a tribal

member sued tribal officials for carrying out a tribal ordinance that was allegedly unlawful under the Indian Civil Rights Act. This Court held that tribal members could not bring a civil cause of action in federal court against tribal officials carrying out acts on behalf of the tribe. The action was specifically described as an intra-tribal dispute, such that federal court jurisdiction would impair the ability of the tribe to govern itself. 436 U.S. at 59–62. The situation presented in *National Farmers Union* is not an intra-tribal dispute. Federal court jurisdiction would not impair the right of the Crow Tribe to govern itself. *Martinez* should not be read as a bar to federal court jurisdiction over the instant claim that the Crow Tribal Court acted beyond its jurisdiction. Nor does the Indian Civil Rights Act itself create a bar to federal question jurisdiction based on federal common law.

The Indian Civil Rights Act is codified in Title 25 of the United States Code. Title 25 governs affairs. Title 28 of the United States Code collects acts of Congress governing jurisdiction and the judiciary. The Indian Civil Rights Act should be codified in Title 28 of the United States Code if it is to be read as the jurisdictional bar that the Ninth Circuit sees it as being. There is nothing in the Indian Civil Rights Act itself that can be read as a bar to federal questions jurisdiction for an action by a non-Indian claiming that a tribal court has acted beyond its jurisdiction.

Nor does the *Martinez* decision bar federal court jurisdiction over the instant case. The doctrine of tribal immunity from suit that was used as part of the rationale for the jurisdictional bar in *Martinez* should be re-evaluated in relation to the circumstances of the instant case. Justice Blackmun recently commented that he "entertains doubts . . . about the continuing vitality in this day of the

doctrine of tribal immunity . . . ," and believes "that doctrine may well merit re-examination in an appropriate case." *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 178–179 (1977) (Blackmun, J., concurring). This is an appropriate case to re-examine any purparted bar to jurisdiction based on the tribal immunity doctrine relied on in *Martinez*. (43 U.S. at 59). *Martinez* did not consider the question presented here of whether actions challenging the existence of tribal court jurisdiction over non-Indians should be heard in federal court, when no intra-tribal disputes are involved. Nor did this Court offer an opinion on this question. *See* 436 U.S. at 53 n.4. The whole emphasis of this Court's language in *Martinez* was on the intra-tribal nature of that suit. This Court stated that the purpose of the Indian Civil Rights Act was to secure for the *American Indian* various rights and to protect *Individual Indians* from unjust acts of tribal governments. *Id.* at 61. This Court perceived that resolution of intra-tribal disputes concerning those rights of Indians would unsettle a tribal government's ability to maintain authority. *Id.* at 60.

In reaching its conclusion in *Martinez* this Court gave special emphasis to proposals that were rejected by Congress in its final draft of the Indians Civil Rights Act. The rejected proposals would have allowed federal court review of the actions of an Indian Tribal Court, when the court action deprived an Indian of important rights. 436 U.S. at 67, 68 and 68–69 n.26. The Court found the rejections of those proposals to show that Congress could not have intended causes of action to exist for the vindication of Indian's rights. All of the rejected proposals themselves and all of the testimony against them discusses only actions by or on behalf of Indians or tribal members. *Ibid.* This authority and reasoning would not apply to the in-

stant case. *Martinez* should be limited to its specific holding that there is no federal court jurisdiction to decide "intra-tribal controversies affecting matters of tribal self-government and sovereignty." *Id.* at 53. This court appeared to limit its holdings to that issue. *Id.* at 53 n.4. The instant case does not present a situation where federal court review would undermine that adjudicatory machinery established by the Pueblo for the resolution of intra-tribal disputes, and thus infringe in the right of the Indians to govern themselves." *Id.* at 59. The case here is not intra-tribal, and the bar of sovereign immunity of the *Martinez* case should not be extended as a broad doctrine barring federal court actions by non-Indians challenging the existence of tribal court jurisdiction.

Denying federal court jurisdiction over a challenge such as the one here, made by a non-Indian to the extent of tribal court jurisdiction, requiring a careful analysis of the federal common law that defines the extent of tribal sovereignty, is not justified by any of this Court's decisions. It would be a departure from this Court's and the Ninth Circuit Court's previous recognition of federal question, jurisdiction based on common law, and it would be unfair.[4]

II. The District Court properly held that under the facts of this case, the Crow Tribal Court was without jurisdiction over the Lodge Grass School District and that the Tribal Court Judgment was unlawfully entered.

[4] This month, the Navajo Tribe suggested to this Court that, at least in some cases, federal jurisdiction exists for challenges to Tribal power, saying that, "there is no reason to believe that if Tribal officers threaten actions arguably beyond the Tribe's power under federal law, the federal courts will not hear suits for injunctions just as they have in *[Kerr-McGee v. Navajo Tribe of Indians* (9th Cir. 1984, *cert. granted*, October 1984, No. 84-68), *argument pending]*. Brief of Navajo Tribe, *Kerr-McGee*, *supra*, at 45.

There is no basis in Federal legislation or in any treaty for subject matter jurisdiction being exerted by the Crow Tribal Court over a political subdivision of the State of Montana.

If this Court reverses the Ninth Circuit and thereby holds that petitioners do have a cognizable claim in Federal Court pursuant to 28 U.S.C. §1331, Judge Battin's thoughtful analysis of the undisputed facts of this case should be upheld. Respondents have never argued that any Congressional statute or Treaty expressly confers civil tort jurisdiction upon the Crow Tribal Court under the undisputed facts of this case. Therefore, whether Tribal Court jurisdiction should be sanctioned in this case depends upon whether, "the power has been retained by the Tribe as an element of inherent sovereignty even after the Tribal Nation became a quasi-sovereign within the exterior boundaries of the United States". *National Farmers Union Insurance* 560 F.Supp. at 215–16 (1983).

Montana v. *United States*, *supra* provides the analytical framework required to determine whether Tribal Courts may exercise civil jurisdiction over non-Indians as an incident of their retained sovereignty.

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on the reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the Tribe or its members, through commercial dealings, contracts, leases or other arrangements. A Tribe may also retain inherent power to exercise civil au-

> thority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe.

Montana at 565–66.

Petitioner Lodge Grass School District No. 27 exists through no consensual or proprietary arrangement with the Crow Tribe of Indians. It exists because Congress in the Crow Allotment Act of 1920, §16, *supra*, required the State of Montana to own land on the reservation provided it was used for public education and mandated that Montana thereby provide Indian children equal educational opportunities on the Crow Reservation. Thus Lodge Grass School District No. 27 is not a profiteer coming onto the Crow Reservation voluntarily subjecting itself to taxation or regulation of any other sort in return for the privilege of doing business. Hence, the sole focus of the correctness of Judge Battin's lower Court decision is whether his decision has threatened or adversely affected the political integrity, the economic security or the health and welfare of the Crow Tribe as a whole under the peculiar facts of this case.

In this connection, it is proper to point out one glaring difference between the Crow Tribal Codes and the Montana statutes governing sovereign immunity. In this connection, it is also meet to discuss the Montana statutes which deal with judgments against governmental entities and methods of satisfying those judgments. The Crow Tribe still embraces sovereign immunity. In other words, were the Lodge Grass School District No. 27 an arm of the Crow Tribe instead of a political subdivision of the State of Montana, respondents, Sage and Not Afraid, would have

been precluded from bringing their action in Crow Tribal Court.

The State of Montana, however, abolished sovereign immunity in its State courts in 1972 when its latest Constitution was ratified. Article II, §18 of the Constitution reads:

> The state, counties, cities, towns and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature.

Section 2-9-311, MCA, provides that a State District Court has exclusive jurisdiction over tort actions brought against the State of Montana or any of its subdivisions. Section 2-9-318, MCA reads, "No levy of attachment or writ of execution shall issue against any property of a governmental entity for the security or collection of any claim . . .". Satisfaction of judgments rendered by State District Courts may be obtained only in conformity with Section 2-9-316, MCA which recites:

> A political subdivision of the state shall satisfy a final judgment out of funds that may be available from the following sources:
>
> (1) insurance;
>
> (2) the general fund or any other funds legally available to the governing body;
>
> (3) a property tax, otherwise properly authorized by law, collected by a special levy authorized by law, in an amount necessary to pay any unpaid portion of the judgment, except that such levy may not exceed 10 mills;
>
> (4) proceeds from the sale of bonds issued by a county, city, or school district for the purpose of deriving revenue for the payment of the judgment

> liability. The governing body of a county, city, or school district is hereby authorized to issue such bonds pursuant to procedures established by law. Property taxes may be levied to amortize such bonds, provided the levy for payment of any such bonds or judgments may not exceed, in the aggregate, 10 mills annually.

The Crow Tribal Court in entering its default judgment and then causing school property to be seized pursuant to its writ of execution, has thrown down the gauntlet. By seizing computers which serve as an integral part of the bi-lingual education programs of the Lodge Grass School District, the Tribal Court frustrated the State of Montana's solicitude for education without interruption due to the abolition of sovereign immunity.

The *Montana*, *supra*, analysis thus was most appropriate under the facts of the instant case. Judge Battin, who is uniquely familiar with local Indian concerns, rightfully concluded that, on balance, a single tort claim of an individual enrolled Tribal member did not involve any critical issue regarding the political integrity or economic welfare of the Crow Tribe as a whole. The evolution of the matter into a seizure of State property by the Tribal Court, however, has paralyzed the governmental duty of the State of Montana to provide quality education on the Crow Reservation. It is no wonder that Judge Battin tipped the scales in favor of the School District. This is especially so since Leroy Sage has every right to prosecute his claim in the courts of the State of Montana.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be reversed and Judge

Battin's judgment should be upheld given his careful analysis of the undisputed facts in this unique case.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
JAN 22 1985
ALEXANDER L. STEVAS
CLERK

No. 84-320

IN THE

Supreme Court of the United States

October Term, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES; AND LODGE GRASS SCHOOL DISTRICT NO. 27,
Petitioners,

v.

CROW TRIBE OF INDIANS; LEROY SAGE, A MINOR; FLORA NOT AFRAID, HIS GUARDIAN; THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; EDDIE ROUNDFACE, GLEN BIRDINGROUND, AND IRA LEFTHAND, JUDGES OF THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; CROW INDIAN TRIBAL COUNCIL; AND DONALD STUART, CHAIRMAN OF THE CROW INDIAN TRIBAL COUNCIL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 29, 1984
CERTIORARI GRANTED NOVEMBER 26, 1984
**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
DOCKET ENTRIES IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT	ii
DOCKET ENTRIES IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION	xi
APPENDIX A: TITLE 3, CHAPTER I, II CROW TRIBAL CODES	1a
APPENDIX B: TITLE 5, RULES OF CIVIL PROCEDURE CROW TRIBAL CODES	5a
APPENDIX C: TITLE 7, CROW TRIBAL CODES—APPELLATE PROCEDURE	33a

DOCKET ENTRIES
IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Supreme Court
No. 84-320

Court of Appeals
Nos. 83-3606
83-3645

NATIONAL FARMERS UNION INSURANCE CO.'S
Petitioner,

V.

CROW TRIBE OF INDIANS, *et al*,
Respondent

PROCEEDINGS HAD IN THE UNTIED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT VOLUME I

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83-3606
Companion No. 83-3645

NATIONAL FARMERS UNION INSURANCE *et al.*,
Plaintiffs-Appellees,

VS.

CROW TRIBE OF INDIANS, *et al.*,
Defendants,

AND

LEROY SAGE, A MINOR AND FLORA NOT AFRAID,
Defendants-Appellants.

FILED in D.C.
November 3, 1982
HON. JAMES F. BATTIN
Judge

Notice of Appeal Filed
January 28, 1983

NATURE
3440—Civil Rights

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(For Add'l. Counsel See Clerk's Card)

DATE	FILINGS-PROCEEDINGS
2-3-83	ASSIGNED DOCKET NUMBER—PREPARED JS-34 CARD. Clerk's Fee, Appellant, N/F. jw
2-3-83	DOCKETED CAUSE AND ENTERED APPEARANCE OF COUNSEL. jw
2-3-83	Sent 19(b) billing letter for failure to pay docket fee. jw
2-10-83	Rec'd copy of dc order file dtd Feb. 4, 1983, re: granting aplts leave to proceed on appeal in forma pauperis. (case file) Clerk's fee, Appellant, F/P. db
2-22-83	FILED CERT OF RECORD (N/T). jw
2-28-83	APLT'S OPENING BRIEF DUE APRIL 11, 1983. jw
3-21-83	Filed aplts' mtn for removal to district court for additional findings of fact. (CIVATT) 3/15 db
4-4-83	Filed aples' opposition to aplts' mtn for removal to district court for additional findings of facts. (CIVATT) 3/31 db
4-14-83	Filed orig and 4 copies of aplt's (SAGE) opening brief and 5 copies of the excerpt of the record, (24 pages), (4/11/83). jw
5-10-83	Filed Order (FLETCHER, CANBY) Aplts' mtn. for a remand to the district court for additional findings of fact is denied. Appeals 83-3606 and 83-3645 are consolidated. The opening brief of aplts' Crow Tribe of Indians and Crow Tribal Court shall be filed within 28 days of the entry of this order. Aples' consolidated answering brief shall be filed according to the provisions of Fed. R. App. P. 31. ru
5-16-83	Recv'd Combined Mtn. by Aples' for consolidation of appeals and for extension of time within which to file Aples' brief. (5/11/83) (Mtn. is Moot, see 5/10/83 Order., notified counsel), case file. ru

DATE	FILINGS-PROCEEDINGS
6-22-83	Filed as of 6/17 per 3 day oral ext., orig and 15 copies of aplt's (CROW TRIBE OF INDIANS) opening brief and 5 copies of the excerpts of the record, (21 pages). (6/13/83). jw
6-22-83	Filed as of 6/16, aplt's (CROW TRIBE OF INDIANS) motion to join in excerpt of record, (CIVATT). jw
7-5-83	Filed order (Dpty clrk, RGRS) the mtn by aplts Crow Tribe of Indians, et al to join in the previously filed excerpt of record is granted. Subject to reconsideration if opposition filed within 10 days. db
7-18-83	Filed aple's motion for extension of time to file brief, (7/13). dm
7-18-83	Filed Order (DPTY CLK) Aples in the above captioned case are granted an extension of time to and including August 3, 1983 to file their briefs. dm
8-4-83	Filed orig and 15 copies of aple's brief, (13 pages), (8/2/83). jw
8-4-83	Sent notice to all counsel re: designation of clerk's record. jw
8-11-83	Rec'd aplt's response to letter sent 8/4, re: designation filed in d.c. (8/9/83). jw
8-11-83	Rec'd aple's response to letter sent 8/4, re: designation filed in d.c. (8/2/83). jw
8-11-83	FILED AS OF 2/22/83, CERT RECORD ON APPEAL IN 1 VOLUME. PLEADINGS VOL. I, CERT COPY. jw
8-18-83	Filed orig and 5 copies of aplt's (SAGE & NOT AFRAID) reply brief, (12 pages), (8/15/83). jw

DATE	FILINGS-PROCEEDINGS
8-18-83	Filed aplt's (SAGE & NOT AFRAID) motion to suspend rules for oral argument and summarily reverse lower court, (8/15/83), (CIVATT). jw
8-22-83	Filed orig and 15 copies of aplt (CROW TRIBE OF INDIANS) reply brief, 16 pages, 8/18/83. jw
8-26-83	Filed Order (DPTY CLK) Aplt's "motion to suspend rules for oral argument and summarily reverse lower court" is construed as a motion to submit these appeals without oral argument and is referred to the panel that will consider the merits of the appeals. dm
8-31-83	Filed as of 8/19/83 SUPPLEMENTAL CERTIFIED RECORD ON APPEAL IN ONE VOLUME; CLERK'S RECORD PLDGS. VOL. TWO. (1-COPY). RECORD NOW IN TWO VOLUMES. ru
11-2-83	Rec'd as of 10/31/83, from counsel for Aplts' Letter dated 10/23/83. RE: Order of 8/26/83. (PANEL). ru
11-15-83	Filed order (dpty clrk for ct) the mtn to dispense with oral argument is denied. The argument will be heard as scheduled on Dec. 6, 1983 in Seattle, Washington. db
11-23-83	Filed, as of 11/21/83, in Seattle, Order (DPTY CLK) It is ordered that counsel be prepared to discuss during oral argument, scheduled for Seattle on Dec. 6, 1983, the effect of No. 82-3636, *R.J. Williams Company, Richard J. Williams and Fireman's Fund Insurance Co.* v. *Fort Belknap Housing Authority*, on this case. (served by Deputy in Seattle). dm
12-6-83	ARGUED & SUBMITTED BEFORE: WRIGHT, ANDERSON, & FLETCHER, CJJ. dm

DATE	FILINGS-PROCEEDINGS
7-3-84	ORDERED OPINION FILED (FLETCHER), (WRIGHT DISSENTING IN PART AND CONCURRING IN THE RESULT) AND JUDG TO BE ENTD. dm
7-3-84	FILED OPINION—RESERVED. dm
7-3-84	FILED AND ENTERED JUDGMENT. dm
7-12-84	Filed Aplt's Bill of costs. (7/10). ru
7-25-84	MANDATE ISSUED
8-17-84	Filed aple's emergency motion for recall of mandate, (8/16), (to lead Judge). jw
8-17-84	Filed aplt's response in opposition to emergency motion for recall of mandate, (8/17), (to lead Judge). jw
8-20-84	Filed Order (WRIGHT, ANDERSON & FLETCHER) Aples' emergency motion to recall the mandate is denied. dm
8-30-84	Rec'd, as of 8/27, certified copy of SC order dated 8/23 granting aples' motion for recall of mandate and staying mandate pending further order of the S.C., (PANEL). dm
9-27-84	Rec'd as of 9/14, certified copy of SC order dated 9/10 continuing the stay of mandate, (PANEL). jw
9-28-84	Rec'd as of 9/17, SC notice dated 8/29 re: notice of filing petition for certiorari. SC # 84-320 jw
12-6-84	Rec'd certified copy of SC order filed 11/26/84 granting cert. (panel) db

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-3645
Companion No. 83-3606

NATIONAL FARMERS UNION INSURANCE COMPANIES, A UTAH CORPORATION, AND LODGE GRASS SCHOOL DISTRICT 27

Plaintiffs-Appellees,

VS.

CROW TRIBE OF INDIANS OF MONTANA, *et al.*,

Defendants-Appellants.

FILED in D.C.
November 3, 1982
HON. JAMES F. BATTIN
Judge

Notice of Appeal Filed
February 16, 1983

NATURE
3440—Civil Rights

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(See Clerk's Card for Additional Counsel)

DATE	FILINGS-PROCEEDINGS
2-22-83	DOCKET NUMBER ASSIGNED. JS34 prepared. Clerk's fees, Appellant, $65. db
2-28-83	DOCKETED CAUSE & ENTERED APPEARANCES OF COUNSEL. db
3-21-83	Filed in 83-3606, aplts' mtn for removal to district court for additional findings of fact. (CIVATT) 3/15 db
5-10-83	Filed 83-3606 Order (FLETCHER, CANBY) Aplts' mtn. for a remand to the district court for additional findings of fact is denied. Appeals 83-3606 and 83-3645 are consolidated. The opening brief of aplts' crow tribe of Indians and Crow Tribal Court shall be filed within 28 days of the entry of this order. Aples' consolidated answering brief shall be filed according to the provisions of Fed. R. App. P. 31. ru
5-10-83	Filed as of 2/22/83 CERTIFICATE OF RECORD. (N/T) FOR FURTHER PROCEEDING SEE 83-3606 ru
12-6-83	ARGUED & SUBMITTED BEFORE: WRIGHT, ANDERSON & FLETCHER, CJJ. dm
7-3-84	ORDERED OPINION FILED (FLETCHER), (WRIGHT DISSENTING IN PART AND CONCURRING IN THE RESULT) AND JUDG TO BE ENTD. dm
7-3-84	FILED OPINION—REVERSED. dm
7-3-84	FILED AND ENTERED JUDGMENT. dm
7-25-84	MANDATE ISSUED
8-17-84	Filed aple's emergency motion for recall of mandate, (8/16), (to Lead Judge). jw
8-17-84	filed aplt's response in opposition to emergency motion for recall of mandate, (8/17), (to Lead Judge).

DATE	FILINGS-PROCEEDINGS
8-20-84	Filed, in 83-3606, Order (WRIGHT, ANDERSON & FLETCHER) Aples' emergency motion to recall the mandate is denied. dm
8-30-84	Rec'd in 83-3606, as of 8/27, certified copy of SC order dated 8/23 granting aples' motion for recall of mandate and staying mandate pending further order of SC, (PANEL). dm
9-27-84	Rec'd in 83-3606, as of 9/14, certified copy of SC order dated 9/10 continuing stay of mandate, (PANEL). SC #84-320 jw
12-6-84	Rec'd in 83-3606, certified copy of SC order dated 11/26/84 granting cert. (panel) db

DOCKET ENTRIES IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION

Plaintiffs
NATIONAL FARMERS UNION INSURANCE COMPANIES, A UTAH CORPORATION, AND LODGE GRASS SCHOOL DISTRICT NO. 27

Defendants
CROW TRIBE OF INDIANS OF MONTANA, THE CROW INDIAN TRIBAL COUNCIL, THE TRIBAL COURT OF THE CROW INDIAN RESERVATION;

ROUNDFACE, EDDIE, BIRDINGROUND, GLEN, AND LEFT HAND, IRA, JUDGES OF THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; AND

STUART, DONALD, CHAIRMAN OF THE CROW INDIAN TRIBAL COUNCIL

FLORA NOT AFRAID, AS GUARDIAN FOR LEROY SAGE, & LEROY SAGE

CAUSE
(Cite the U.S. Civil Statute under which the Case is Filed and Write a Brief Statement of Cause)

---

25 USC 1302 Rule 65 F.R.C.P.

Pltfs seek temporary restraining order, preliminary injunctions & permanent injunction restraining defts from asserting jurisdiction over pltfs in Crow Tribal Crt & from enforcing a judgment rendered in Crow Tribal Crt.

Attorneys

Plaintiffs

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FILING FEES PAID			STATISTICAL CARDS	
DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
11-3-82	3461—$60.00		JS-5	11-05-82
			JS-6	

PLAINTIFF	DEFENDANT	
Nat'l Farmers Union Ins. et al	Crow Tribe of MT et al	Docket No. 82-230-BL Page__of__Page__

DATE	NR.	PROCEEDINGS
11-3-82	1	Filec Civil Cover Sheet.
11-3-82	2	Filed Pltfs Mot for TRO.
11-3-82	3	Filed Pltfs Mot for Preliminary Injunction.
11-3-82	4	Filed Pltfs Certification & Affdvt of Attorney.
11-3-82	5	Filed Verified Complaint.
11-3-82	6	Filed Temporary Restraining Order: It Is ORDERED that defts, their agents, servants, employees & attys & all persons in active concert or participation w/them are hereby restrained from attempting to assert jurisdiction over pltfs or issuing writs of execution out of Cause No. Civ. 82-287 of the Crow Tribal Crt until this Crt orders otherwise further ORDERED that bond should not be required of pltfs; further ORDERED that this order will expire 10 days after entry unless prior to said time it is for a good cause shown extended for longer period; further ORDERED that pltfs mot for preliminary injunction be set for hrg on Nov. 15, 1982, at 9:00 a.m. in Crtrm in Blgs; iss'd this 3rd day of Nov., 1982.
11-3-82		Issmd Sms. Del'd orig + 7 w/cy. of TRO, MOT for TRO, Mot for prelim Injunction, Verified complt & form 285 to USM for svc. Cert cy. of TRO & cy. of sms handed to USM.

DATE	NR.	PROCEEDINGS
11-3-82		Ent Rec of Proc: Pltf Co. Hartman moves for TRO; pres stats thereof. Mr. Belue pres stats on behalf of Leroy Sage—not party at this time. Crt suggest pltf amend complt to include L. Sage. Crt set hrg on Preliminary Injunction for Nov. 15, 1982, at 9:00 a.m.
11-10-82	7	Filed Summons w/cert. copy of Temporary Restraining Order & USM 285 at'd; Served Crow Tribe of Indians of Montana on 11-9-82; Served Glen Bird in ground on 11-9-82; Served Eddie Round face on 11-9-82; Served Crow Indian Tribal Council on 11-9-82; Served Donald Stuart on 11-9-82; Served Ira Left hand on 11-9-82; Served Crow Tribal Court on 11-9-82.
11-15-82	8	Filed Defts Mot to Dismiss for Lack of Jurisdiction w/Sprt Brf att'd; cert of svc thereon.
11-15-82	9	Filed Pltfs Affdvt of Co. re: joinder of Parties.
11-15-82		Lodged proposed Order allowing joinder of Parties; del'd to JFB.
11-15-82	10	Filed Pltfs Mot to Extend TRO; cert of svc thereon.
11-15-82		Lodged proposed Order extending TRO; del'd to JFB.
11-16-82	11	Filed Deft Sage Mot to Dismiss; cert of svc thereon.
11-16-82	12	Filed Deft Sage Brf in Sprt of Mot to Dismiss; cert of svc thereon.
11-24-82	13	Filed Pltfs' Resp. to Mots. to Dism. for Lack of Jurisdiction w/cert. of mailing thereon.
11-24-82	14	Filed Pltfs' Amendment to Complaint w/ cert. of mailing att'd.

DATE	NR.	PROCEEDINGS
12-3-82	15	Filed Defts Reply to Pltfs Response Oppo defts' Mot to Dismiss. Cert of svc attchd.
12-3-82	16	Filed Notice of Hrg on Mot by Pltf. Cert of Svc attchd. Set for Dec 14, 1982 at 9:00 a.m. in Blgs.
12-6-82	17	Filed Deft Sage Brf in Reply to Pltfs' Brf in Response to Mot to Dismiss. Cert of svc thron.
12-13-82		Lodged Defts Application for Limited Admission and Proposed ORDER Thro.
12-13-82	18	Filed ORDER that Flora Not Afraid, as guardian for Leroy Sage, & Leroy Sage be added as ptys deft hereto. The Crt understands that these 2 pt thru their counsel will enter their appearance in this case. Cpys mail to co of rec.
12-14-82	19	Filed Not. of Appearance as attys of record by Thomas Acevedo & Francis Lamebull w/cert of srv thereon.
12-14-82	20	Filed Deft's Brief in Opp. to Pltfs Mot. for a Preliminary Injunction w/cert of srv thereon.
12-14-82	21	Filed Appl. for Limited Admission & ORDER that pursuant to Rule 1(c) of the Rules of Practice of the US Dist. Crt for the Dist. of MT, Thomas R. Acevedo is hereby permitted to appear & participate in this action as counsel for Deft. Crow Indian Tribe, et al. Copies mailed to counsel of record.
12-14-82		Ent. Rec. of Proc. Attys stats on Mot. to Dismiss & PI. Matter deemed submitted & taken under advisement.

DATE	NR.	PROCEEDINGS
12-29-82	22	Filed ORDER that the indiv. defts. Leroy Sage, a minor; his guardian, Flora Not Afraid; their counsel; the indiv. defts. named above & anyone attempting to act on the basis of Crow Tribal Court Case 82-287, are enjoined by a permanent inj. from executing n any judgment or pressing any claim against the pltfs in the above-captioned case arising from the May 27, 1982, injury to Leroy Sage. IT IS FURTHER ORDERED that the Crow Tribal Court is without jurisdiction over the tort claim raised by Leroy Sage, an Indian, against non-Indians, that arose out of events on non-Indian fee land. *See*, MT v. US, 450 US 544 (1981), *Swift Transportation vs. John*, 546 F.Supp. 1185 (D.C. Ariz. 1982). IT IS FURTHER ORDERED that defts' mot. to dism. is denied. Copies mailed to counsel of record.
1-14-83	23	Filed Deft's Mot to Reconsider Crt's Order of Dec 29, 1982 w/cert of svc attchd.
1-26-83	24	Filed Memorandum Opinion. Sent copies to co of rec.
1-26-83	25	VOL XVI PG. 1105 Filed and Entered JUDGMENT that the Indiv defts Leroy Sage, a minor; his guardian, Flora Not Afraid; their counsel; the indiv defts named above and anyone attempting to act on the basis of Crow Tribal Court Case 82-287, are enjoined by a permanent inj from executing on any judgment or pressing any claim against the pltfs in the

(Continued)

DATE	NR.	PROCEEDINGS
		above captioned case arising from the May 27, 1982, injury to Leroy Sage. IT IS FURTHER ORDERED that the Crow Tribal Court is without jurisdiction over the tort claim raised by Leroy Sage, an Indian, against non-Indians, that arose out of events on non-Indian fee land. *See*, MT v. US, 450 US 544 (1981), *Swift Transportation vs. John*, 546, F. Supp. 1185 (D.C. Ariz. 1982) IT IS FURTHER ORDERED that defts' mot to dismiss is denied. Copies mailed to counsel of record.
1-28-83	26	Filed *NOTICE OF APPEAL* on behalf of Leroy Sage & Flora Not Afraid.
1-31-83		Mailed Cert cpy of N/A, Docket fee notification form, cert cpy of Docket sheets & Case info sheet to C/A/ Mailed to Co of Rec.: cpys of N/A, Not to ptys in CV appeals, docket sheets & in addition to applnt the Transcript desig & ordering form w/cover letter.
2-4-83	27	Filed Motion to Proceed in Forma Pauperis. Cert of svc to come.
2-4-83	28	Filed Aff in Sup of Motion to Proceed in forma Pauperis w/cert of svc to come.
2-4-83	29	Filed ORDER that the motion of defts Sage and Not Afraid for leave to proceed in Forma Pauperis upon appeal is granted. Cpys sent to co of rec. Cpy of Order mailed to C/A.
2-10-83	30	Filed appellees concurrance that no transcript of proceedings will be ordered. w/ cert of srv thereon.

DATE	NR.	PROCEEDINGS
2-16-83	31	Filed *NOTICE OF APPEAL* on behalf of the Crow Tribe of Indians.
2-16-83		Mailed Cert cpy of N/A, Docket fee notification form, cert cpy of docket sheets to Ninth Circuit. Mailed o Co. of Rec: cpys of N/A, Not. to ptys in CV appeals, cpy of docket sheets & in addition to aplnt the Transcript desig & ordering form w/cover letter.
2-16-83	32	Filed cpy 1, aplnts (Sage & Not Afraid) Transcript Desig. & Ordering form. Mailed CERTIFICATE OF RECORD to C/A.
2-25-83		Phoned Thomas Acevedo & inquired on Deft's Mot. to Reconsider Crt's Order filed 1-14-83; Mr. Acevedo advised that the initial mot. had been filed prematurely & they will not be renewing the mot.
3-4-83	33	Filed Cpy 1, aplnts (Crow Tribe) Transcript Desig & Ordering Form. Mailed CERTIFICATE OF RECORD to C/A.
4-12-83	34	Filed Aplnts Design of Record w/cert of srv thereon (82-3606)
5-16-83	35	Filed ORDER from C/A: Aplnts mo/for a remand to the dist crt for add. findings of fact is denied. Appeals 83-3606 & 83-3645 are consolidated. The opening brief of aplnts Crow Tribe of Indians & Crow Tribal Crt shall be filed w/in 28 days of entry of this order. Aplees consolidated answering brief shall be filed according to FRAP 31.
7-25-83	36	Filed ORDER that the aplees are granted an ext. of time to 8-3-83 to file their briefs. This order subj to reconsideration if any opp. is filed w/in 10 days of entry of this order.

DATE	NR.	PROCEEDINGS
8-2-84	40	Filed ORDER that plaintiffs' complaint is dismissed for failure to state a claim for federal relief. Copies mailed to counsel of record.
8-6-84		Copy mailed to Big Horn County Atty.
8-27-84	41	Filed ORDER from Supreme Crt of US that the mandate of the US C/A for the 9th Circuit is stayed pending further order of the Supreme Crt or of the Crt.
9-10-84	42	Filed ORDER that the order of this crt entered on 8-2-84 dismissing the action is hereby rescinded. FURTHER ORDERED that the Order of this Crt of 12-29-82 is reinstated, subj. to further order of this Crt & action of the US Supreme Crt, & that the individual defts Leroy Sage, a minor, his guardian, Flora Not Afraid, their counsel, the individual defts named above, & anyone attempting to act on the basis of Crow Tribal Crt civil case 82-287, are enjoined from executing on any judgment or selling any property by execution or pressing any claim against the pltfs in this case arising from the 5-27-82, injury to Leroy Sage. Cpys mailed to co. of rec.
9-13-84	*43*	*Filed Motion re:supreme crt order of 9-10-84. w/cert of srv by phone.*
9-14-84	44	Filed Cert cpy of Order from Supreme Crt of US: Upon Further Consideration of the application of co. for the pet. the response filed thereto & the reply filed thereto, IT IS ORDERED that my order entered 8-21-84 be cont. pending this Crt's action

(Continued)

DATE	NR.	PROCEEDINGS
		of the pet. for writ of cert. If the pet. for writ of certiorari is denied, this order is to terminate automatically. In the event the pet. for writ of cert is granted, this order is to remain in effect pending the sending down ct the judgment of this Crt. Opinion atchd. by Justice Rehnquist.
10-9-84	45	Filed Mot. for Return of School Property Seized Pursuant to Tribal Court Writ of Execution on behalf of pltfs w/cert of srv thereon.
10-9-84	46	Filed Affidavit in Supp. of Mot. for Entry of Order Regarding Seized Property w/cert of srv thereon.
10-11-84	47	Filed Mot. & Brief Opposing Mot/of Pltfs w/ cert of srv thereon.
11-9-84	48	Filed Pltfs Notice of Hearing on Motion for return of property seized to be heard 11-15-84 at 10:30 a.m. w/crt of svc thrn.
11-13-84	49	Filed Pltfs' Brf of Pltfs Re: A Posting of Bond & Retn of its Property Seized by Defts w/cert. of mailing.
11-15-84		ENT. REC. OF PROC: Pltf. argued its mot. to return school property Deft. Sage & Not Afraid opposed the motion; pltf. replied; Matter taken udner advisement.
11-16-84	50	Filed Defts. Sage & Not Afraid's Withdrawal of Motion w/cert. of serv.
12-10-84	51	Filed ORDER that the individual defts shall cause the school dist. property seized purs. to a Crow Tribal Crt writ iss'd on 8-1-84, to be retrnd to the school dist. w/in 5 days of the date of this Order. Cpys mailed to co. of rec.

DATE	NR.	PROCEEDINGS
12-13-84		Rec'd phone call from Mr. Belue advising he had not rec'd his copy of Order; mailed 2nd copy to counsel Belue.
12-19-84	52	Filed ORDER that the USM is directed to serve this day the following docs. on file in the case on the Crow Tribal Court, Crow Agency, MT and Atty Clarence T. Belue, Hardin, MT: 1) The injunc. order of Dec. 29, 1982; 2) The order of Sept. 10, 1984, reinstating the Dec. 29, 1982, injunction order; 3) The opinion & order of Dec. 10, 1984, requiring the indiv. defts to cause the retn of the school district property to the Lodge Grass School District. Copies mailed to counsel of rec. w/the exception of Mr. Belue who will be served personally. Handed cert. copy to USM w/2 sets of docs. #52, #51, #42 & #22 per order, for service.
12-20-84	53	Filed Pltfs Motion for Contempt, Imposition of Fines, Reimbursement of Attys' Fees and Costs, Recovery of Property and Hearing w/crt of svc thrn.
12-20-84	54	Filed Affidavit of Donald L. Harris w/crt of svc thrn.
12-20-84	55	Filed ORDER that a hearing will be held on the pltfs motion filed 12-19-84 [Mot for Contempt, Imposition of Fines]. Hearing to be held on 1-3-85 at 9:30 a.m. Counsel are directed to attend. Mailed copies to co of rec. Cert mail receipt #P599033108.
12-21-84	56	Filed Copy of Order of 12-19-84 w/USM form 285 at'd; sevd Glenn Birdinground on behlf of Crow Tribal Crt on 12-20-84.

DATE	NR.	PROCEEDINGS
12-21-84	57	Filed Return to Order of 12-20-84 from atty Belue for defts Flora Not Afraid and Leroy Sage w/crt of svc thrn and attchmts.
12-28-84	58	Filed Withdrawal & ORDER OF WITHDRAWAL of Contempt Mot. Filed by Pltf National Farmers Union Ins. Co. HEREBY ORDERED that the Contempt Mot. filed by Nat'l Farmers Union INs. Co. is w/drawn & that the hrgin set for consideration of said Mot. is vac. This Order, however, does not apply to the Contempt Mot. filed by the Lodge Grass School Dist. & the hrging set in connection w/ that matter. Cpys mailed to co. of rec & Crow Tribal Crt.
12-28-84		Is'd subp on behalf of pltf.
1-2-85	59	Filed Subp w/retrn thereon srvd 12-31-84.
12-28-84	60	Filed Pltf Lodge Grass School Dist. #27's Brief in Supp. of Mot. for Contempt, Inposition of Fines, Reimbursement of Attys fees & costs & Recovery w/cert of srv thereon.
1-2-85	61	Filed Response to Pltfs Mot. for Contempt, Imposition of Fines, Reimbursement of Attys Fees & Costs, Recovery of Property & Hrging w/cert of srv thereon.
1-2-85		Iss'd Subp. on behalf of pltf., handed Orig. to runner.
1-3-85		Is'd Subp; handed orig to Pltf co for svc.
1-3-85		Ent. Rec. of Proc. Co. for School Dist Ramirez stat on mot. for contempt. Moved for cont. of this hrging if Judge Roundface presence is nec. Wit. S/E,

(Continued)

DATE	NR.	PROCEEDINGS
		Exh. of'd & rec'd. Crt will grant a cont. Will try to call in another judge & will notify co. of hrging date. Co. to let Crt know how much time they need to prepare.
1-3-85	62	Filed Mot. for Contempt, Imposition of Fines, Reimbursement of Attys Fees & Costs, Recovery of Property, & Hrging on behalf of pltfs w/cert of srv thereon.
1-3-85	63	Filed Affidavit of Rodney Hartman w/cert of srv thereon.
1-3-85	64	Filed Response of Clarence T. Belue, Flora Not Afraid & Leroy Sage to Mot. for Contempt, Mot. for Disciplinary Action against Jack Ramirez, Donald L. Harris, & Rodney T. Hartman, & Brief, srvd on all co. in Crtrm.
1-3-85	65	Filed Mot. re: attempts by pltfs to introduce evid. re Order of Tommy Roundface. Srvd on all co. in crtrm.
1-10-85	66	Filed Atty Richard Anderson's Notice of Appearance on behalf of J. Ramirez, D. Harris, & Rod Hartman w/crt of svc thrn.

APPENDIX A

TITLE 3 ESTABLISHMENT OF TRIBAL COURTS AND TRIBAL CODES

Chapter 1 Establishment of Crow Tribal Courts

Section 101 Crow Tribal Court

(a) There is hereby established the "Crow Tribal Court"

(b) The Crow Tribal Court shall be a court of general civil and criminal jurisdiction and shall hear appeals from final decisions of

(1) Tribal administrative bodies.

(2) The "Small Claims" session of Crow Tribal Court.

Section 102 Crow Juvenile Court

(a) There is hereby established the "Crow Juvenile Court"

(b) The Crow Juvenile Court shall have original and exclusive jurisdiction over all cases arising under the Tribal Juvenile Code as set forth in Title 9 of the Crow Tribal Code.

Section 103 Crow Court of Appeals

(a) There is hereby established the "Crow Court of Appeals."

(b) The Crow Court of Appeals shall have original and exclusive jurisdiction to hear all appeals from final judgments and/or orders of the Crow Tribal Court and the Crow Juvenile Court.

Section 104 Applicable Law

(a) The laws and treaties of the United States shall be the

applicable law in the Crow Tribal Court where they apply to the Crow Indian Reservation or the Crow Tribe as a matter of federal law or where incorporated by reference in Tribal Law.

(b) In all other cases, the ordinances and resolutions of the Crow Tribe as well as the provisions of the Crow Tribal Code shall be the law applied in the Crow Tribal Court.

(c) Wherever the issue in controversy shall not be resolved by federal law or by the laws of the Crow Tribe, the judge may seek authority in the custom, usage, and jurisprudence of the Crow Tribe, traditional or modern, and to common law jurisprudence both in law and equity.

(d) State laws and federal laws not applicable to the Crow Tribe or the Crow Indian Reservation shall not be deemed applicable law in any proceeding, except as provided herein, unless agreed to be applicable by the parties by stipulation with consent of the court, nor shall they be construed to have any greater authority than the laws or customs or usage of the Crow Tribe.

Chapter II Jurisdiction of Crow Tribal Courts

Section 201 Policy.

It is the intention of the Crow Tribe of Indians to exercise that jurisdictional authority which has not otherwise been enclosed by acts of the United States Congress and failure to legislate in a particular area shall not be deemed a waiver of that authority. The jurisdiction of the Crow Tribal Courts shall be used to insure due process and equal protection of the law for all persons residing within and entering the boundaries of the Crow Indian Reservation.

Section 202 Jurisdiction—Territorial

The jurisdiction of the Crow Tribal Courts shall extend to any and all lands within the exterior boundaries of the Crow

Indian Reservation as the same may exist from time to time including all easements, rights-of way, and fee patented lands within such boundaries.

Section 203 Jurisdiction—Personal

(a) The Crow Tribal Court shall have jurisdiction over all persons who reside, enter, and/or transact business within the exterior boundaries of the Crow Indian Reservation, provided that the Court shall not exercise criminal jurisdiction over non-Indians.

(b) For purposes of jurisdiction, "persons" shall include individuals, businesses, partnerships, associations, cooperatives, and corporations.

Section 204 Jurisdiction—Property

(a) The Crow Tribal Court shall have jurisdiction over all property, real and personal, which is located within the exterior boundaries of the Crow Indian Reservation. Such jurisdiction shall extend to the determination of ownership rights in property, interests in property, and the application of property to the satisfaction of a judgment for which the owner of the property is deemed to be liable.

(b) The jurisdiction of the Crow Tribal Courts shall be limited only by federal law; *provided however*, that the Crow Tribal Court shall have jurisdiction to render money judgments against persons, businesses, partnerships, corporations, and cooperative associations who are not subject personally to the jurisdiction of the court only if the action is commenced by an attachment of the defendant's property which is located within the exterior boundaries of the Crow Indian Reservation. Unless the defendant subjects himself to the jurisdiction of the court, any judgment in an action commenced by the attachment of property belonging to a party not person-

ally subject to the jurisdiction of the court may be executed only against the property actually attached.

Section 205 Jurisdiction—Subject Matter

The Crow Tribal Courts shall have jurisdiction over all civil causes of action arising within the exterior boundaries of the Crow Indian Reservation and over all criminal offenses which are enumerated in Title 7 of the Crow Tribal Code and which are committed within the exterior boundaries of the Crow Indian Reservation.

Section 206 Sovereign Immunity

Nothing contained in the preceeding provisions on jurisdiction, or any other provision of the Crow Tribal Code shall be construed as a waiver of the sovereign immunity of the Crow Tribe, its officers, or businesses, unless specifically waived.

APPENDIX B

TITLE 5. RULES OF CIVIL PROCEDURE

Rule 1. Scope of the Rules.

These rules shall govern the procedures in the Crow Tribal Court in all suits of a civil nature. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 2. Commencement of a Civil Action.

A civil action is commenced by filing a written complaint, copies of the complaint for each named defendant and the court, and payment of $10.00 filing fee with the Clerk of the Crow Tribal Court.

Rule 3. Form of the Civil Complaint.

All civil complaints must include the name of the court, the names and addresses of all parties to the action, and introductory statement setting forth the type of civil action involved, a jurisdictional statement, factual allegations, claims, relief sought, and certification of the complaint that all statements are true and correct.

Rule 4. Service of Process.

(a.) Summons: Issuance—Upon filing of a civil complaint, the Clerk of the Crow Tribal Court shall issue a summons and present the summons to an authorized process server for delivery to the named defendant(s).

(b.) Same: Form—The summons issued by the Clerk of the Crow Tribal Court shall include the name of the court, the names of all parties, be directed to the named defendant(s), state the name of the plaintiff and the name of the plaintiff's

legal representative. The summons shall also clearly state the time and date the named defendant(s) must appear, defend, and answer the complaint, either in person in open court or by written document. The summons shall also state in bold print that defendants's failure to appear, defend, and answer at the time and date set forth will cause a judgment by default to be rendered against him for the relief demanded by plaintiff.

(c.) Complaint—A true and correct copy of the complaint shall be delivered to the defendant along with the applicable civil summons.

(d.) Service of Process—

(1) Defendants within the exterior boundaries of the Crow Indian Reservation: If the named defendant(s) is within the exterior boundaries of the Crow Indian Reservation, the summons and complaint shall be served by the Crow Police on such defendant(s) either personally, or at his dwelling house or usual place of abode by leaving copies of the summons and complaint with some person of suitable age and discretion residing at that same place.

(2) Defendants outside the exterior boundaries of the Crow Indian Reservation: If a named defendant(s) or his property is subject to the jurisdiction of the Crow Tribal Court, but he is outside of the exterior boundaries of the Crow Indian Reservation, a copy of the summons and complaint shall be mailed certified/return receipt requested to his home and/or business address so as to give the named party reasonable notice of the action and a reasonable opportunity to be heard.

(3) Defendants of unknown whereabouts: If, after careful investigations, a named defendant who comes within the jurisdiction of the Crow Tribal Court cannot be located, then the Crow Tribal Court shall direct that service of process be accomplished by publication. Notice of the civil action shall be published in a local newspaper of

general circulation in Big Horn County, Montana, for three (3) consecutive issues.

(e.) Service of Process: Return—The person serving the summons and complaint on the named defendant(s) shall promptly provide the Crow Tribal Court with proof that service was made. If service of process is made either by mail or publication, the Clerk of the Crow Tribal Court shall collect and retain the appropriate materials showing such service was made. All proof of service documents shall be made part of the applicable case file.

Rule 5. Service of Other Pleadings and Motions.

(a.) General. Every pleading or motion, other than plaintiff's original complaint, ex parte motions, or third party demands, shall be served upon each of the parties to the action and filed with the Clerk.

(b.) Time. Motions shall be served and filed no less than five (5) days before hearing the movant's demand. Incidental demands, except third-party demands, shall be served and filed within the time set out in Rule 8; answers shall be served and filed within the time prescribed in Rule 6.

(c.) Manner of Service. Service shall be made upon each attorney of record and each party not represented by an attorney through certified mail or by delivery to the attorney's office or the party's residence. Each pleading or motion filed with the Clerk shall be accompanied by an affidavit verifying compliance with this rule.

Rule 6. Answer by the Defendant.

(a.) General. All defendants named in the complaint shall respond by written answer or by filing an appropriate motion in accordance with Rule 7(a).

(b.) Time. Defendant, including a defendant to any incidental demand, shall answer within fifteen (15) days of the service of

process upon him, or within ten (10) days of denial by the court of a motion filed pursuant to Rule 7(a). For purposes of these rules, the day of service shall not be included. The last day of the period shall be included unless it is Saturday, Sunday, or a Legal Holiday, in which case, the period shall end on the next day which is not a Saturday, Sunday, or Legal Holiday.

(c.) Contents. Defendant shall affirm or deny every allegation or claim by plaintiff in his complaint, provided that failure to affirm or deny any allegation or claim shall be deemed an affirmation of that allegation or claim. Defendant shall assert each and every defense, set-off, or compulsory counterclaim pursuant to Rule 8(a), provided that failure to assert any defense, set-off, or compulsory counterclaim shall be deemed a waiver thereof. Nothing in this rule shall prevent the assertion of two or more defenses in the alternative, even though the factual or legal basis thereof may be inconsistent or mutually exclusive.

Rule 7. Pre-trial Motions.

(a.) Preemptory Motions. Defendant shall assert any preemptory defense to plaintiff's claim in his answer or by motion filed with the Clerk prior to expiration of the period allowed for answer. Preemptory defenses shall be limited to the following:

(1) Lack of jurisdiction over the subject matter;

(2) Lack of jurisdiction over the person;

(3) Insufficiency of process or of service of process;

(4) Failure to state a claim on which relief can be granted; or,

(5) Dissolution of attachment where quasi in rem jurisdiction is asserted.

If defendant chooses to assert any preemptory defenses by motion he shall be deemed to have waived any preemptory defense he fails to assert in that motion. Defendant shall not be deemed to have submitted himself to the jurisdiction of the

court if he incorporates a preemptory motion in his answer. Service of defendant's motion shall be made in accordance with Rule 5.

(b.) Other Pre-Trials Motions. Any other application for an order of the court prior to trial shall be made in the form of a motion. All motions shall be in writing, shall state the specific grounds and reasons the motion should be granted, and shall set forth the exact relief or order sought. Service of any motion shall be made in accordance with Rule 5.

Rule 8. Incidental Demands.

(a.) Compulsory Counterclaim. Defendant shall assert as counterclaim any cause of action that arises out of the transaction or occurence that is the subject matter of the opposing party's claim, provided that adjudication of defendant's coounterclaim does not require the presence of parties or parties not subject to the court's jurisdiction. Defendant need not assert claims that have not arisen at the time that answer is required pursuant to Rule 6, or claims that are the subject of pending litigation.

(b.) Permissive Counterclaim. Defendant may assert as a counterclaim any cause of action against an opposing party not arising out of the same events that gave rise to the opposing party's claim.

(c.) Cross Claims. Any party may assert against a co-defendant to an original complaint or incidental demand a claim arising out of the same events that gave rise to the opposing party's claim.

(d.) Delay for Asserting Counterclaims and Cross-Claims. Counterclaims and cross-claims shall be served on the opposing party and filed with the Clerk within the delay allowed to answer the plaintiff's complaint in accordance with Rule 6. "Complaint" as used in this section shall include counterclaims or cross-claims asserted against the cross-claimant. "Plaintiff"

as used in this section shall include cross-claimants or counterclaimants.

(e.) Third-Party Practice. At any time after commencement of the action, any defending party may cause service of process to be issued against any third party subject to the jurisdiction of the court who is or may be liable to him for all or part of the plaintiff's claim against him. Third party defendants shall be served in the manner prescribed in Rule 4 for service of original complaints. All forms of third-party practice allowed by Rule 4 of the Federal Rules of Civil Procedure, as amended, shall be allowed in the Crow Tribal Court where not inconsistent with these Rules.

(f.) Intervention. The court shall allow intervention by a third party at any time prior to trial if

(1) an ordinance of the Crow Tribe provides a right of intervention, or

(2) adjudication of the claims before the court without the intervening party would impair or impede his ability to protect some right or interest he asserts.

After the trial has begun, the court may allow intervention, provided that any person asserting an interest in property seized by writ of execution shall be allowed to intervene prior to distribution of the proceeds of sale. The court may also permit intervention before trial when the third party's claim or defense and the original or main action have a question of law and fact in common. Application for intervention shall be served on all parties in the manner prescribed in Rule 5(c).

Rule 9. Amended and Supplementary Pleadings.

Amended and supplementary pleadings may be submitted with leave of court. A motion to amend pleadings or to submit supplementary pleadings shall be filed with the Clerk and served on all parties in the manner set out in Rule 5. The

motion shall be granted or denied ex parte unless the opposing parties object within three (3) days of receipt of the motion.

Rule 10. Pre-Trial Conference.

In order to expedite the disposition of a civil action, the court may order that a pre-trial conference be held. The judge assigned to hear the case shall call the conference, and all parties to the action and/or their legal representatives shall be required to attend. Matters to be considered at the pre-trial conference shall include:

(1) Clarification and/or simplification of issues;

(2) The need and/or desirability to amend pleadings;

(3) The possibility of obtaining admissions of facts in the case; and

(4) Such other matters as may aid in the speedy and just disposition of the case.

If the court in its discretion should call for a pre-trial conference, it should be called within fifteen (15) days after all pleadings have been filed. Notice setting forth the time, date, and place of the conference shall be sent to each party and/or their legal representative at least seven (7) days prior to the date of the conference.

Rule 11. Evidence and Discovery.

(a.) Evidence. The rules of evidence applicable to civil actions in the Crow Tribal Court shall be the Federal Rules of Evidence, as amended.

(b.) Discovery. Discovery shall be allowed in civil actions in the Crow Tribal Court, provided that Rules 26 through 37 of the Federal Rules of Civil Procedure, as amended, shall be the applicable rules of discovery in Tribal Court.

(c.) Subpoenas.

(1) Subpoena for Hearing or Trial: At the request of any party to civil action, subpoenas for attendance at a hearing or trial to be held by the court shall be issued by the court.

(2) Form: Every subpoena shall be issued under the signature of a judge of the court. Each subpoena shall state the name of the court and the title of the action shall command each person to whom it is directed to attend and give testimony and/or produce documentary evidence at the time and place specified in the subpoena.

(3) Contempt of Court: Failure by any person without an adequate and reasonable excuse to obey a subpoena served upon him may be deemed a contempt of court and punished accordingly.

(4) Service. Subpoenas shall be served in the manner described in Rule 4(d,e).

Rule 12. Jury Trials.

(a.) Procedure. Any party may demand a trial by jury by filing a written demand for a jury trial with the Clerk not less than ten (10) days prior to commencement of the trial, provided that trial by jury shall not be available in.

(1) A suit demanding less than one hundred dollars ($100.00) exclusive of interest and costs;

(2) A pre-trial motion or motion for summary judgment;

(3) A probate, partition, mandamus, habeas corpus, quo warranto, injunction, interpleader, guardianship, adoption, or divorce proceeding;

(4) A proceeding to review a Tribal or administrative decision; and,

(5) All cases where a jury trial is specifically prohibited by a Tribal law or ordinance.

Failure to timely demand a jury trial shall be deemed a waiver of the right to trial by jury.

(b.) Composition. All civil trials by jury shall be heard by a jury composed of six (6) persons.

(c.) Selection. The Crow Tribal Court may permit the parties, or their legal representatives, to conduct the examination prospective jurors, or the Court may conduct the examination itself. If the Court conducts the examination, then the Court shall permit the parties or their legal representatives to supplement the examination by further questions as the Court deems proper.

(d.) Challenges. In the examination of prospective jurors, each party shall have a total of three (3) pre-emptory challenges, or challenges without cause.

(e.) Trial by the Court. In all civil actions in which no wirtten demand for trial by jury has been made or in which no jury trial is permitted, the issues shall be tried by the court, provided that the court in its discretion, upon the motion of any party to an action in which juries are permissable, may order a trial by jury. Said discretion, however, is not to be exercised arbitrarily and the court should consider the dictates of general fairness to all parties in making a decision to grant such motions.

Rule 13. Assignment of Cases for Trial.

(a.) General. The Crow Tribal Court shall set for trial all civil actions coming before it. The trial docket shall be set in the discretion of the Chief Judge of the Crow Tribal Court, provided that upon the application of all parties to an action, the trial date may be set as requested.

(b.) Consolidation. The court may order consolidation of two or more lawsuits pending in Tribal Court if the suits share common question of law or fact. The court may order a single trial for some or all of the issues presented in the separate lawsuits.

(c.) Severance. The court may order severance of incidental demands from the original action.

(d.) Continuance. Upon the motion of any party the court may order a continuance for good cause shown. A motion for continuance, consolidation, or severance shall be filed with the Clerk and served on all parties in the manner prescribed in Rule 5. The court shall rule on the motion ex parte unless the opposing parties object within three (3) days of receipt of the motion.

(e.) Dismissal. An action shall be dismissed upon the motion of the plaintiff prior to answer. After answer and action may be dismissed on the joint motion of all parties or after a hearing on plaintiff's motion to dismiss. An action may be dismissed after answer without prejudice to plaintiff only upon a showing by plaintiff that justice can best be served through dismissal.

Rule 14. Trial Procedures.

(a.) Opening Statements. At the commencement of all civil trials, parties to the action shall be afforded the opportunity to make an opening statement. The plaintiff, or his legal representative shall make the first statement, and then the defendant, or his legal representative may make an opening statement.

(b.) Presentation of the Case. The plaintiff shall present his case first. The defendant may then present his defense.

(c.) Oath or Affirmation. Any and all witnesses testifying in a trial held before the Crow Tribal Court shall be required to swear on their oath to tell the truth. In lieu of an oath, a witness may testify based on a solemn affirmation to tell the truth.

(d.) Form of Testimony. In all trials held before the Crow Tribal Court, witnesses shall testify orally in open court, unless otherwise provided by rules adopted by the Crow Tribal Court.

(e.) Procedures of Testimony. The party calling a witness to testify shall begin the examination of the witness by "direct

examination". The opposing party shall then examine the witness by "cross examination". The party calling the witness, if it is desired, may then examine the witness by "re-direct examination"; the opposing party may then "re-cross examine".

(f.) Interpreters. If the court should find that an interpreter is needed for the examination of a witness in a trial, the court may appoint a non-interested person of the court's choice to serve as an interpreter for the party or parties involved. Compensation for the interpreter's services shall be considered part of the "costs" of the proceedings.

(g.) Final Arguments. At the end of the defendant's presentation of evidence, the court shall allow the plaintiff to present a final closing argument to the jury, if trial is by jury, or to the court. The defendant may then present his final closing argument.

(h.) Jury Instruction. At the close of evidence and final arguments in a trial by jury, the court shall instruct the jury as to the law and the meaning of the law involved in the case under consideration. The parties, or their legal representatives may file written requests that the court instruct the jury on the law as set forth in the requests. Opportunity shall be given to each party to make objections to a failure to give a requested instruction. Said opportunity shall be out of the hearing of the jury. A copy of the instructions given to the jury signed by the trial judge shall become a part of the permanent record of the trial.

Rule 15. Findings by the Court.

In all civil actions tried by the court without a jury, the court shall specifically decide the facts of the case and state separately its conclusions of law based on those facts. The findings of facts and conclusions of law shall be set forth in writing, signed by the trial judge, and made a part of the permanent record of the trial. The court may take the matter under advisement provided that it shall render a decision within

thirty (30) days of the close of trial. Notice of judgment shall be sent by registered mail to all parties when the matter is taken under advisement.

Rule 16. Judgment and Costs.

(a.) Judgment. Definition—"Judgment" as used in the rules includes a decree and any order of the court from which an appeal may be taken.

(b.) Entry of Judgment. Upon a general verdict of a jury, or upon a decision by the court that a party shall recover a sum certain and/or costs or other relief, or that all relief shall be denied, the court shall prepare, sign, and enter the judgment. Every judgment shall be set forth on a separate document and signed by the presiding judge.

(c.) Costs. Unless otherwise directed by the court, costs shall be allowed as of course to the prevailing party. Costs shall be prepared by both parties at the close of each trial and submitted to the Clerk.

(d.) Effect of Judgments. A final judgment or Order of the Crow Tribal Court or Court of Appeals shall be conclusive and binding upon the Crow Tribal court and Foreign Courts, and shall bar any new action between the same parties or their privies in the same controversy for the same or different remedies in the Crow Tribal Court or any Foreign Court. A copy of the judgment or order, duly certified by the Clerk of Court, shall be conclusive proof of the judgment or order.

Nothing in these Rules shall require the Crow Tribe to give effect to judgments of any other jurisdictions if that jurisdiction fails to give effect to judgments of the Crow Tribal Court or Court of Appeals.

Rule 17. Default Judgments.

(a.) Motion and Entry of Default. A motion of default may be made against any defendant who fails to answer a civil com-

plaint within the time prescribed in Rule 6. Default shall be entered in the minutes of the court by the Clerk upon filing of the motion.

(b.) Judgment of Default. Plaintiff shall present sufficient evidence in open court to support a default judgment in his favor, provided judgment of default shall not be rendered less than three (3) days after filing a motion of default.

(c.) Notice of Default Judgment. After judgment of default has been rendered by the court, the Clerk shall notify the party in default of the judgment by certified mail.

(d.) Setting Aside Judgment of Default. Within thirty (30) days of the judgment of default the party in default may apply to set aside the judgment for good cause shown, provided that nothing in this section shall prevent execution of judgment in accordance with Rule 8.

Rule 18. Stay of Proceedings to Enforce Judgment.

(a.) Automatic Stay. No writ of execution shall issue nor shall any proceedings by allowing for enforcement of judgment until ten (10) days after the entry of the judgment or mailing of notice of judgment when required.

(b.) Stay During Appeal. When an appeal of a final judgment or order of the Crow Tribal Court is taken the court, upon appellant's motion, may grant a stay of execution of judgment, provided that appelant post a surety bond sufficient to guarantee performance of the judgment, and payment of the costs of appeal, on or before the date of filing his appeal.

(c.) Injunction Pending Appeal. When an appeal is taken from the granting of a temporary restraining order or a final judgment, granting, dissolving, or denying an injunction, the court, in its discretion, may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as the court considers proper for the security of the rights of the adverse party.

Rule 19. Special Judgments.

(a.) Summary Judgment. Summary judgment may be granted in Crow Tribal Court, provided that Rule 56 of the Federal Rules of Civil Procedure, as amended, shall be the law applicable in Tribal Court for this purpose.

(b.) Directed Verdict. In any case tried without a jury, the court may direct a verdict in favor of defendant if at the close of plaintiff's case it appears with legal certainty plaintiff cannot prove that which he claims.

(c.) Judgment N.O.V. A judgment *non obstante verdicto* may be granted in Crow Tribal Court, provided that Rule 50 of the Federal Rules of Civil Procedure, as amended, shall be the law applicable in Tribal Court for this purpose.

(d.) Declaratory Judgments. The Crow Tribal Court may grant declaratory judgments to determine rights, status, and other legal relations in any case it deems appropriate.

Rule 20. Execution of Judgments.

(a.) General Provisions.

(1) Foreclosure by any creditor to enforce payment of a debt secured by a mortgage, lien, or other security interest may only be authorized by judgment of the Crow Tribal Court.

(2) The court may summarily issue a writ of execution, upon the application of a judgment creditor, to satisfy the terms of any judgment, provided judgments rendered by the courts of any other jurisdiction may only be made executory by a judgment of the Crow Tribal Court specifically recognizing the order of the foreign court.

(3) The writ shall direct the Crow Tribal Police to seize and take possession of particularly described property. The court shall refuse to issue the writ if the application does not sufficiently describe the property to be seized.

(4) Seizure shall be made within 90 days of the issuance of the writ, provided that successive writs may issue upon re-application of the judgment creditor.

(b.) Preference. Seizure by writ of execution shall create a preference to the proceeds of a public sale of the thing(s) seized in favor of the judgment creditor. Security interests perfected prior to seizure are superior to the judgment creditor's preference and rank from the date of perfection. A security interest is perfected according to the law of the place the secured transaction occurred, provided that the Crow Tribal Court shall determine the validity of that security interest under the law of the place the transaction occurred.

(c.) Return. Notice to Judgment Debtor; Injunction. Upon seizure by writ of execution the Crow Police shall return to the Clerk a written list of the things seized. The Clerk shall immediately notify the judgment debtor of the seizure and the things seized by registered mail. At any time prior to sale of the things seized the judgment debtor may apply to the court for injunctive relief for any of the following purposes:

(1) To reduce an excessive seizure, if it can be shown that the value of the property seized exceeds the value of the seizing creditor's interest and the property is subject to division;

(2) To prevent the seizure of exempt property;

(3) To prevent the seizure if it be shown that some illegality has occurred in the proceedings prejudicial to the judgment debtor;

(4) To prevent the seizure if it be shown that the judgment has been satisfied.

(d.) Public Sale. Public sale of property seized shall be conducted by the Crow Police at the time and in the manner directed by the rules of court, provided that the court may order the sale to be made at public auction under the direction

of a professional auctioneer. In all cases the property to be sold shall be appraised and advertised for sale three times at weekly intervals in a newspaper of general circulation in the Crow Reservation area, provided that the court may order the immediate sale at public auction of perishable property.

(e.) First Offering. At the time and place set for public sale the property seized may not be sold for less than its appraised value in cash. If the thing seized fails to bring its appraised value at first offering it shall be re-advertised, in the manner set out in section (d) of this Rule, and offered for sale a second time. At the second offering, the thing seized shall be sold for whatever it will bring in cash.

(f.) Distribution of Proceeds. The proceeds from the public sale of the thing seized shall be distributed in the following manner:

(1) The costs of sale shall be deducted from the proceeds and paid into the court's general fund;

(2) Payment of security interests superior to the seizing creditor's as defined in section (b) of this Rule, provided that a creditor may intervene at any time prior to distribution of the proceeds of sale to assert a superior interest, provided further that failure to assert such an interest shall be deemed a waiver of preference to the thing seized;

(3) Payment of the seizing creditor's interest;

(4) Payment of inferior security interests;

(5) and, payment of the remainder to the judgment debtor.

Upon the written and signed return of the Crow Police or professional auctioneer stating a description of the property seized the name of the purchaser, and the value received, and upon payment in cash, the Clerk shall distribute the proceeds accordingly.

(g.) Act of Sale. Within five days of public sale and receipt of the purchase price in cash, the Clerk shall pass an act of sale to the purchases. The act of sale adds nothing to the force and effect of the adjudication, but is only intended to afford proof of it.

(h.) Nothing in this Rule shall prevent a seizing creditor from demanding seizure and sale of property to satisfy a debt of which all installments are not yet due.

(i.) Garnishment by writ of execution.

(1) The judgment creditor may petition the court for seizure of property belonging to the judgment creditor but under the control of a third person, including any amount of money the third person may be indebted to the judgment debtor.

(2) Annexed to the petition shall be interrogatories directed at establishing what interest of the judgment debtor the garnishee has in his custody. The petition and interrogatories shall be served in the manner provided in Rule 5, and answer shall be made in the manner provided in Rule 6.

(3) Failure to answer shall be cause for issuance of a subpoena to the garnishee demanding his presence at a hearing on the judgment creditor's petition. Costs of the hearing, including reasonable attorney's fees shall be assigned against the garnishee.

(4) If the garnishee admits in his answer, or it is found at the hearing of plaintiff's petition, that he has in his custody property belonging to the judgment debtor, the court shall order delivery of the property to the Clerk for distribution.

(j.) Examination of Judgment Debtor. To aid execution of a judgment the court may, upon the motion of a judgment creditor, order the judgment debtor to appear personally in court and produce any books, papers, and other documents relating

to his property as described in the motion. The date for examination of the judgment debtor shall be not less than ten (10) days exclusive of legal holidays after service of the motion and order of the court in accordance with Rule 5.

(k.) Exemptions. The following items shall be exempt from seizure by writ of execution:

(1) Clothing and apparel;

(2) Dishes, utensils, pots and pans;

(3) Beds and bed sheets and blankets;

(4) Books and musical instruments;

(5) Dining tables, stoves, refrigerators, heating apparatus and a single radio in good repair;

(6) Traditional Indian things, including but not limited to clothing, beadwork, teepee poles, etc.; provided, that no property shall be exempt from seizure to satisfy the debt incurred for purchase of that property.

(7) 25% of the debtor's net wages per week or $70.00 per week in net wages, whichever is greater, shall be exempt, provided that 35% of the debtor's net wages per week or $100.00 per week in net wages, whichever is greater, shall be exempt if the debtor supports himself and one or more dependents who cannot work.

(l.) Special rules of foreclosure upon individually held trust property. Actions in Tribal Court for foreclosure upon trust property mortgaged pursuant to 25 USC 483a shall be subject to the following special provisions:

(1) In cases where the Crow Tribe is the mortgagee, beneficial title to trust property subject to foreclosure shall vest in Crow Tribe without public sale upon payment to the mortgagor of the difference between the appraised value of the land, plus costs, and the amount of the debt.

(2) In all cases where the Crow Tribe is not the mortgagee, the Crow Tribe shall have the first option to purchase the property subject to foreclosure at private sale.

a. Notices of a judgment of foreclosure shall be sent by certified mail to the Tribal Chairman and the Chairman of the Land Resources Committee by the mortgagee.

b. Notice of intent to exercise the first option to purchase shall be mailed to the mortgagee within thirty (30) days of the date of mailing the notice of judgment.

c. If the Crow Tribe exercises its option to purchase, beneficial title shall pass in the manner prescribed in part (l.) (1).

(3) In cases where the Crow Tribe is not the mortgagee and the Crow Tribe does not exercise its option to purchase, the property shall be offered to individual Crow Indians in the following manner:

a. Notice of the offering shall be published in a weekly publication of general circulation on the Reservation for at least thirty (30) consecutive days prior to sale. The notice shall include the appriased value of the property, and the date, time, and place for accepting bids.

b. The sealed bids of individual Crow Indians shall be accepted at a time, date, and place specified by the mortgagee, provided that the place for accepting bids shall be within the Crow Reservation.

c. If no bid of an individual Crow Indian is equal to or greater than the appraised value of the land, the property may be offered for public sale in the manner prescribed in parts (d) through (g) of this Rule.

d. Beneficial title to the property shall pass to the individual Crow Indian upon payment to the mortgagee of the appraised value of the property, provided that the pro-

ceeds of the sale shall be distributed in the manner prescribed in part (f) of this Rule.

(4) For the purposes of this part, "appraised value" shall be defined as the fair market value of the property as determined by the appraisal staff of the Bureau of Indian Affairs.

(5) Legal title to trust property subject to foreclosure shall be considered to have remained in the United States throughout the proceedings in Tribal Court if

a. Beneficial title passes to the Crow Tribe in the manner described in part (l.) (1), or

b. Beneficial title passes to the individual Crow Indian in the manner described in part (l.) (3) (d).

If beneficial title does not pass to the Crow Tribe or an individual Crow Indian, the Indian mortgagor shall be considered to have been vested with an unrestricted fee simple interest from commencement of the suit.

(6) Should any part(s) of this Rule be held violative of the United States Constitution, an act of Congress, or the Constitution any By-laws of the Crow Tribe, all remaining parts of this Rule shall continue in effect until held unvalid or amended by the Crow Tribal Council.

Rule 21. Attachment.

(a.) General. Prior to judgment in an action to recover money, the court may issue a writ of attachment against any property subject to a writ of execution. The petition shall be accompanied by affidavit(s) showing that one of the following conditions exists:

(1) The defendant has done or is about to do some act that will place property subject to a writ of execution beyond the reach of his creditors or give an unfair preference to one or more of them; or

(2) The defendant is not subject to the personal jurisdiction of the court.

Nothing in this rule shall be construed to allow "self-help" repossession prior to judgment of property encumbered by a security interest.

(b.) Dissolution of writs. Defendant may move to dissolve the writ of attachment and recover damages and/or wrongful attachment without submitting himself to the jurisdiction of the court. The reasonable value of attorney's fees incurred through the motion to dissolve may be awarded as an element of damages. At the hearing on defendant's motion it shall be plaintiff's burden to prove that grounds for attachment exist.

(c.) Release. Defendant may obtain release of property subject to a writ of attachment by depositing with the court an amount equal to the appraised value of the thing seized. Security shall be returned to defendant if and when a judgment on the merits in his favor is final.

(d.) Property may not be sold subject to a writ of attachment until a judgment in favor of plaintiff is rendered and final and a writ of execution has issued, provided that the sale of perishables prior to judgment may be ordered in accordance with Rule 20, section (d.).

(e.) Special Rules Applicable.

(1) Attachment shall create a preference in favor of plaintiff that shall rank from the date of attachment according to the provisions of Rule 20, section (b.), provided that there shall be no preference if writs of attachment are dissolved in accordance with section (b.) of the Rule.

(2) Notice to the defendant that attachment has been made shall be served by the Clerk by registered mail after return of the Crow Police in accordance with Rule 20, section (c.).

(3) Garnishment by writ of attachment may be ordered in accordance with Rule 20, section (i.).

Rule 22. Injunction.

(a.) General. A permanent injunction shall issue in cases where irreparable injury, loss, or damage may otherwise result to the applicant, or in other cases specifically provided by law.

During the pendency of an action for permanent injunction the court may grant a temporary restraining order, a preliminary injunction, or both.

(b) Temporary Restraining Order.

(1) Issuance. A temporary restraining order may be granted without written or oral notice to the adverse party, or his legal representative, only if the facts shown by the applicant's verified complaint indicate that immediate and irreparable injury, loss, damage, or hom will result to the applicant before the adverse party or his legal representative can be heard in opposition.

(2) Form. Every temporary restraining order shall set forth the name of the court, the names of the parties involved, the time and date of the issuance of the order, and shall state the injury to be incurred and why it is irreparable, and why the order was granted without notice to the adverse party.

(3) Duration. Each temporary restraining order shall expire by its terms within the time set by the order. Said time shall not exceed ten (10) days, unless extended by the court for good cause shown.

(c.) Preliminary Injunction. Upon filing of a written motion for preliminary injunction by any party, the court shall order that a hearing be held not less than three (3) nor more than ten (10) days from the date the motion was filed. Notice of the hearing shall be sent to all parties by the Clerk. An order for preliminary injunction shall issue when it appears that irreparable harm or injury will result before trial of the petition for permanent injunction if the motion is not granted. An appeal may be taken by either party within ten (10) days of the court's decision.

(d.) Security. No temporary restraining order or preliminary injunction shall issue except upon the posting of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by the party who is found to have been wrongful restrained or enjoined.

Rule 23. Extraordinary Remedies.

(a.) General Provisions. Upon plaintiff's petition for writ of habeas corpus, quo warranto, or mandamus, the court shall order the names defendant(s) to show cause why a write should not issue.

(1) A hearing on plaintiff's motion shall be held not less than three (3) nor more than ten (10) days, exclusive of legal holidays, after the issuance of the order.

(2) Defendant shall answer in writing before the hearing.

(3) The court shall render a written decision within forty-eight (48) hours of the hearing. If the court decides that a writ should issue, failure to comply shall be cause for issuance of a comtempt citation against defendant.

(4) Appeal of the court's decision shall not suspend the execution of the writ.

(b.) Habeas Corpus. A writ of habeas corpus shall command defendant who has custody or physical control of another person to release that person to the court. Any interested party may file a petition for writ of habeas corpus.

(c.) Mandamus. A writ of mandumus shall

(1) Direct public officer to perform duties required by law, or

(2) Compel a corporation or officer thereof to perform duties required by the corporate character or by-laws, or

(3) Compel a corporation or officers thereof to recognize the rights of corporate members or share holders.

The term "public officer" as used in this section and section (d.) of this Rule shall include former public officers and their heirs.

(d.) Quo Warranto. A writ of quo warranto shall order a public officer or officers of a corporation to cease exercise of the powers of office where no such authority exists.

Rule 24. Eviction.

(a.) General. Notice of vacate. When an owner or lessor of real property wishes to evict the occupant therefrom, after the right to occupancy has ceased, the owner or lessor or his agent, shall first cause a written notice to vacate the property to be delivered to the occupant. The notice shall allow the occupant ten (10) days from its delivery to vacate the premises, provided that the owner or lessor shall give notice to a lessee at least ten (10) days before the end of the month if the lease has no definite term.

(b.) Order To Show Cause. If the occupant fails to comply with a notice of eviction given accordance with section (a.), of this Rule, the court upon the motion of the owner or lessor, shall order the occupant to show cause not earlier than three (3) days, exclusive of legal holidays, after the service of the order upon him why he should not be evicted. The written motion shall include the specific reasons for eviction and shall be verified by the notarized affidavit of the owner or lessor.

(c.) Order of Eviction. If the court finds that the motion of owner or lessor should be granted, the court shall order the occupant to leave the premises within twenty-four (24) hours of issuance. Failure to comply with the order shall be cause for the issuance of a warrant to the Crow Police for physical eviction of the occupants.

(d.) Appeal. Either party may appeal the court's ruling on owner or lessor's motion, but appeal shall not suspend the execution of the court's order.

Rule 25. Parties.

(a.) Real Party Interest. Every action in the Crow Tribal Court shall be prosecuted in the name of the real party in interest, except that an executor, administrator, guardian, bailee, trustee, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may bring suit in his name without joining the party for whose benefit the action is brought.

(b.) Capacity.

(1) Minors. Parents or guardians of persons under eighteen years of age shall sue or be sued on behalf of the minor in their custody.

(2) Incompetents. Persons adjudged incompetent of managing their affairs or caring for their physical needs shall sue or be sued through their guardians.

(3) Guardians ad litem. Minors or incompetents who do not have a parent or guardian may sue by his next friend or by a guardian ad litem.

(c.) Joinder. Joinder of claims, remedies, and parties shall be allowed in the Crow Tribal Court, provided that Rules 18, 19, 20, 21, and 22 of the Federal Rules of Civil Procedure, as amended, shall be the law applicable in Tribal Court for this purpose.

(d.) Class Actions. The Crow Tribal Court may entertain class actions provided that Rules 23, 23.1, and 23.2 of the Federal Rules of Civil Procedure, as amended, shall be the law applicable in Tribal Court for this purpose.

(e.) Substitution. It shall be within the discretion of the Crow Tribal Court to order substitution of parties in any action before the court.

Rule 26. Small Claims Procedure.

(a.) General. In cases where the amount in controversy, or the value of personal property involved, does not exceed one hundred dollars ($100.00), plaintiff may elect to invoke the small claims procedure of the Crow Tribal Court as provided in sections (b.) through (j.). The purpose of this procedure is to provide a quick and inexpensive means for persons subject to the jurisdiction of the court to assert minor claims.

(b.) Availability. Plaintiff who is not represented by an attorney may elect to invoke the small claims procedure of the Crow Tribal Court by completing a petition form provided by the Clerk and payment of a fee of five dollars ($5.00), provided that where the amount in controversy is less than twenty dollars ($20.00), the amount due upon filing the petition form shall be one dollar ($1.00).

(c.) Restrictions. Small claims procedures may not be invoked in the following instances:

(1) A case asserting title to real property, involving a right to Tribal office or position, or involving a civil or political right;

(2) A case involving the domestic relations of husband and wife, including property, support, and alimony claims incident to marriage;

(3) A probate, guardianship, emancipation, partition, receivership, liquidation, haveas corpus, or quo warranto proceeding;

(4) A case where attachment or eviction is sought;

(5) A case in which the Crow Tribal is a defendant; and,

(6) Any other case or proceeding excepted by law.

(d.) Commencement of Suit. Upon receipt of the petition form and filing fee, the Clerk shall set a final date and notify the plaintiff, orally or in writing. The Clerk shall notify defendant(s) by service of citation containing the following information:

(1) The date and time of trial of plaintiff's claim and the location of the court;

(2) The date on which written answer shall be filed in accordance with section (e.) of this Rule;

(3) The plaintiff is not represented by an attorney and that the court can award attorney's fees in accordance with section (f.) of this Rule; and,

(4) A copy of plaintiff's petition form.

Service of process shall be made by certified mail.

(e.) Answer. Defendant(s) who is represented by an attorney or who intends to assert a counterclaim, third party demand, or cross claim, shall file his answer in writing with the Clerk within five (5) days, exclusive of legal holidays, after service of citation. In all other cases, defendant need not answer in writing and may state his answer to the court at the trial of the plaintiff's claim. Failure to assert an incidental demand by timely written answer shall not be deemed a waiver of defendant's cause of action, but the court may stay the proceedings to allow plaintiff, co-defendant or third-party defendant time to answer. If defendant fails to appear at the trial and plaintiff proves his case to the satisfaction of the court, a final judgment in favor of plaintiff may be rendered without prior default.

(f.) Attorneys. If defendant is represented by an attorney the court may stay the preceedings to allow plaintiff to obtain representation. Should judgment be rendered in favor of plaintiff, the court may in its discretion order defendant to pay plaintiff's expenses, including reasonable attorney's fees.

(g.) Dismissal. If after answer, plaintiff fails to appear at the trial, judgment shall be rendered dismissing the suit with prejudice, at plaintiff's cost.

(h.) Judgment. The judgment shall be in writing and signed by the Judge. Notice of judgment shall be served on a defendant against whom judgment is rendered if defendant failed to answer in writing or in person. Execution of judgment shall be carried out through the procedures enumerated in Rule 20.

(i.) Appeal. Within ten (10) days, exclusive of legal holidays, any party wishing to appeal a decision of the Tribal Court rendered through small claims procedure shall petition the trial judge for trial do novo to be heard under the normal procedures of the Tribal Court, provided that if appellant is unsuccessful at the second trial the court shall order appellant to pay the expenses appellee incurs as a result of the appeal, including reasonable attorney's fees.

Rule 27. Limitations.

All actions upon a judgment or decree of the Crow Tribal Court shall be commenced within ten (10) years of the date it was rendered. All other actions shall be commenced within two (2) years of the date the cause of action arose.

APPENDIX C

TITLE 7 RULES OF APPELLATE PROCEDURE IN THE CROW COURT OF APPEALS

Rule 1. Scope of Rules.

These rules shall govern the procedures in appeals from Civil and criminal judgements and/or final orders of the Crow Tribal Court and the Crow Juvenile Court.

Rule 2. When An Appeal May Be Taken.

(a) Appeals of right. Any party to an action in the Crow Tribal Court shall have the right to appeal any criminal convictions or any judgement or order in a civil case before the court, except as provided in part (b) of this rule and Title 6, Rule 22.

(b) Discretionary appeals. It shall be within the discretion of the Crow Court of Appeals to entertain appeals in the following cases.

1. Conviction of any traffic offense;
2. Order of eviction;
3. Judgments rendered through the small claims procedure of the Crow Tribal Court; and,
4. Orders or judgments of the Crow Tribal Juvenile Court.

Rule 3. Appeal of Right—How Taken.

(a) Filing of Notice of Appeal, Civil and Criminal: An appeal of judgment or order of the Crow Tribal Court shall be taken by filing a notice of a appeal with the Clerk of the Crow Tribal Court within ten (10) days of the date of the entry of judgment or order appealed from, provided that upon a showing of ex-

cusable neglect, the Crow Tribal Court may extend the time for filing of the notice of appeal by any party for a period not to exceed thirty days from the expiration of the normal period allowed for the filing of a notice of appeal.

(b) Notice of Appeal; Form—The notice of appeal, whether it involves a Criminal or Civil action; shall specify the name of the Court from which the appeal is taken, the name of the party or parties taking the appeal, the judgment or order from which the appeal is taken and the court to which the appeal is taken.

(c) Services of the Notice of Appeal: The Clerk of the Crow Tribal Court shall serve notice of the filing of notice of appeal, whether a civil or criminal action is involved, by mailing a copy of the notice of appeal to each party and each party's legal representative. The Clerk shall note on each copy when the notice of appeal was filed.

Rule 4. Preliminary Injunction.

(a) Temporary Restraining Order and Preliminary Injunction: How Taken. An appeal from the granting of a temporary restraining order or preliminary Injuntion may be sought by filing a petition for permission to appeal with the clerk for the court within five (5) days after the entry of such order by the Crow Tribal Court.

(b) Form or Contents of Petition: The petition shall contain a statement of the facts necessary to understand the issues and questions of law involved, a statement of the reasons the order should be lifted, and a statement of injuries, damages, or harm being incurred by the petitioner.

Rule 5. Discretionary Appeal—How Taken.

(a) Application to file a discretionary Appeal. In those cases where the Court of Appeals may within its discretion entertain an appeal, appellant shall file a notice of appeal in the manner set out in Rule 3. Within 20 days of filing a notice of appeal. Appellant shall submit to the court an application to file a

discretionary appeal and brief in support of his application. Appellee may express his opposition to the application by filing a brief within fifteen (15) days after receipt of appellant's brief in support of the application.

Rule 6. Release Pending Appeal of A Criminal Conviction.

Application for the release of a convicted defendant pending appeal of the judgement of conviction shall first be made in the Crow Tribal Court. If the Crow Tribal Court refuses to release pending appeal, or imposes conditions of release, the Crow Tribal Court shall state in writing the reasons for the action taken. Thereafter, if an appeal is pending, appellant may motion for release, or modification of conditions of release, to the Crow Court of Appeals or a judge thereof. Such a motion shall be determined promptly after appellant and appellee present their oral and/or written arguments on the motion.

Rule 7. Record.

(a) Composition of Record on Appeal, the original papers and exhibits filed in the Crow Tribal Court, the transcript of the proceedings, if any, and a certified copy of the final judgment or order appealed from shall constitute the record on appeal in all cases, civil and criminal.

(b) Statement of Proceedings when no report or transcript made! If no report of the evidence or proceedings at a trial or hearing was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence and proceedings. Said statement shall be filed with the Clerk of the Crow Tribal Court. The appellant shall serve a copy of the statement on appellee, and the appellee shall have ten (10) days to raise objections and propose amendments to the statement and file those objections and proposed amendments with the Clerk of the Crow Tribal Court. The Crow Tribal Court shall settle the

objections, make any necessary amendments, and finally approve the statement for inclusion in the record of appeal.

Rule 8. Transmission of the Record.

(a) The record on appeal, including the transcript or statements of proceedings, shall be completed and turned over to the Crow Court of Appeals within thirty (30) days after the notice of appeal is filed by appellant or application for discretionary appeal is granted unless the Crow Tribal Court extends the time for good cause shown. Appellant shall take whatever action is necessary to enable the Clerk of the Crow Tribal Court to assemble the record, including paying for the cost of preparing transcripts.

(b) When the record on appeal is complete, the Clerk of the Crow Tribal Court shall transmit a complete copy of the record to each judge of the Crow Tribal Court of Appeals who have been designated to hear the appeal. The time and date of the transmission shall be noted on each copy of the record.

(c) Upon transmission of the record on appeal to the judges of the court of appeal and upon receipt of a docket of the Crow Court of Appeals.

Rule 9. Filing and Service of Document on Appeal.

(a) Filing: Parties to an appeal shall file an original and four (4) copies of any and all papers required or permitted with the Clerk for the Crow Court of Appeals.

(b) Service of Papers: Copies of all papers filed with the Clerk of the Crow Court of Appeals by parties to an appeal shall be sent by certified mail to opposing parties and their legal representatives by the party filing such papers. All papers filed with the Clerk shall be accompanied by a written statement of the party filing such papers or his legal representatives certifying that such papers have been mailed to the opposing party(s) or his legal representative(s).

Rule 10. Briefs, Memoranda, and Statements.

Within twenty (20) days after the record of an appealed action is transmitted to the Crow Court of Appeals, the appellant shall file a written brief, memorandum, or statement in support of his appeal with the Clerk of Court. The appellee shall have fifteen (15) days after receipt of appellant's brief, memorandum or statement within which to file a reply brief, memorandum, or statement. Filing and service in either case shall be accomplished in the manner provided in Rule 9. No further response shall be allowed to either party without leave of court.

Rule 11. Amicus Curiae.

In any appellate proceeding, amicus beiefs, memoranda or statements shall be permitted only in the following situations:

1. When all parties to the action consent to the filing of an amicus curiae brief, memorandum, or statement;
2. By leave of court pursuant to a properly filed motion; and,
3. At the request of the court.

Rule 12. Oral Argument.

(a) Provision for: The Crow Court of Appeals shall decide all upon the briefs, memoranda, and statements filed together with the record of the trial court, without oral arguments unless either party requests oral argument and shows the court that such is necessary and/or will aid the court in its decision. Nothing in these rules, however, shall its decision. Nothing in these rules, however, shall preclude the court from ordering oral arguments on its own motion.

(b) Procedure: When oral argument are ordered, the clerk of Court shall notify both parties of the specific time, date, and place the arguments are to be heard. At the hearing both appellant and appellee shall have a maximum of twenty (20) minutes to present their respective arguments. Appellant shall be permitted to both open and close the arguments.

Rule 13. Decision.

All decisions of the Crow Court of Appeals shall be arrived at by a simple majority of the three judge panel. All decisions shall be issued in written form, and all judgements on appeal shall be final.

Rule 14. Frivalous Appeals.

If the Crow Court of Appeals finds that a party has filed a frivalous appeal, the Court may award the appellee his just damages plus single or double costs.

Rule 15. Costs.

If an appeal is dismissed by the Crow Court of Appeals, appellant shall pay all costs of the appeal. If the judgement of the trial court is affirmed, the court, in its discretion, may order the appellant to pay all costs of the appeal or direct the parties to pay a designated portion of the costs. If the judgement of the trial court is reversed, the court, in its discretion may order the appellee to pay all costs of the appeal, or direct the parties to pay a designated portion of the cost.

Rule 16. Issuance of Mandate.

A mandate of the Crow Court of Appeals shall issue ten (10) days after entry of judgement in the appeal.

Office-Supreme Court, U.S.
FILED
JAN 18 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-320

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES; and LODGE GRASS SCHOOL DISTRICT No. 27,

Petitioners,

vs.

CROW TRIBE OF INDIANS: LEROY SAGE, a minor; FLORA NOT AFRAID, his guardian; THE TRIBAL COURT OF THE CROW INDIAN RESERVATION: EDDIE ROUNDFACE, GLEN BIRDINGROUND, and IRA LEFT HAND, Judges of the Tribal Court of the Crow Indian Reservation; CROW INDIAN TRIBAL COUNCIL; and DONALD STUART, Chairman of the Crow Indian Tribal Council,

Respondents.

On Petition for Writ of Certiorari to The United States Court of Appeals for The Ninth Circuit

BRIEF OF AMICUS CURIAE STATE OF WASHINGTON IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether there is a federal claim for relief against Indian tribal governments that unlawfully assert civil jurisdiction over nonIndians.

2. Whether the Tribal Court of the Crow Indian Reservation has jurisdiction over claims that involve the State of Montana (or its subdivisions), that arise on state-owned land, and that occur in connection with activities that are compelled or encouraged by state and federal law or policy.

TABLE OF CONTENTS

	Page
Questions Presented	i
Interest of the State of Washington	1
Summary of Argument	3
Argument	5
I. Introduction	5
II. Congress did not intend that the Crow Tribal Court should have jurisdiction over tort claims by a tribal member against a non-member	8
A. The Treaty Provisions	8
B. The Allotment Acts	10
C. The Indian Reorganization Act	11
D. The Understanding of the Executive	15
E. Constitutional Considerations	17
F. The Applicability of Montana v. United States	19
III. The Court of Appeals erred in holding that the District Court did not have jurisdiction under 28 U.S.C. § 1331	22
Conclusion	23

TABLE OF AUTHORITIES

Page

Cases:

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 19

McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973) 3, 5

Montana v. United States, 450 U.S. 544 (1981) 5, 8, 10, 11, 18, 20, 21

National Farmers Union Insurance Companies, et al., v. Crow Tribe of Indians, et al., 560 F.Supp. 213 (E.D. Mont. 1983) 6, 20
736 F.2d 1320 (9th Cir. 1984) 6, 20
___ U.S. ___, 105 S.Ct. 7 (1984) (Opinion of Mr. Justice Rehnquist as Circuit Justice) 6, 22

National League of Cities v. Usery, 426 U.S. 833 (1976) 21

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 2, 3, 10, 20

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1977) .. 22

Talton v. Mayes, 163 U.S. 376 (1896).....18, 19

United States v. Wheeler, 435 U.S. 313 (1978) 18

Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980) 2

Williams v. Lee, 358 U.S. 217 (1959) 21

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)..... 7

Constitutional Provisions:

Bill of Rights (Amendments I-X) 17, 18, 19

Fourteenth Amendment 17

Treaties:

First Treaty of Fort Laramie, 11 Stat. 749 (1851)..... 8

Second Treaty of Fort Laramie, 15 Stat. 649 (1868) 3, 8, 9, 10

TABLE OF CASES—Continued

Page

Treaty with the Choctaws, 7 Stat. 22 (1978)..... 10

Treaty with Dancing Rabbit, 7 Stat. 33 (1830)..... 18

Treaty of Holston, 7 Stat. 39 (1791) 8

Treaty of Hopewell, 7 Stat. 18 (1785)..... 8, 10

Treaty with the Navajos (15 Stat. 667) 9

Statutes:

25 U.S.C. § § 1301 et. seq. (Indian Civil Rights Act) 5, 22, 23

28 U.S.C. § 1331 ..... 5, 22

Crow Allotment Act of 1920, 41 Stat. 751 ..... 4, 10

Indian Reorganization Act of 1934, 48 Stat. 984 ...4, 11, 12, 14, 15

General Allotment Act of 1887, 24 Stat. 388 .....2, 4, 10

Other Authorities:

General Population Characteristics, United States Summary, 1980 Census of Population, Bureau of the Census, Table 71, "General Characteristics for American Indian Persons on Reservations and Alaska Native Villages." . 2

"Wheeler-Howard Act — Interpretation", Op. Sol. I.D. Ind. Aff. 1917-1974, Vol. I, 484 (M-27810, Dec. 13, 1984) 15

"Powers of Indian Tribes", (M-27781) 55 I.D. 14 (1934) 19

2 Op. Atty. Gen. 693 (1834) 18, 19

Hearings Before the Committee on Indian Affairs, United States Senate as S.2755, 73rd Cong. 2d Sess. (1934) ..13-15

No. 84-320

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES; and LODGE GRASS SCHOOL DISTRICT No. 27,

Petitioners,

vs.

CROW TRIBE OF INDIANS: LEROY SAGE, a minor; FLORA NOT AFRAID, his guardian; THE TRIBAL COURT OF THE CROW INDIAN RESERVATION: EDDIE ROUNDFACE, GLEN BIRDINGROUND, and IRA LEFT HAND, Judges of the Tribal Court of the Crow Indian Reservation; CROW INDIAN TRIBAL COUNCIL; and DONALD STUART, Chairman of the Crow Indian Tribal Council,

Respondents.

On Petition for Writ of Certiorari to The United States Court of Appeals for The Ninth Circuit

BRIEF OF AMICUS CURIAE STATE OF WASHINGTON IN SUPPORT OF PETITIONERS

INTEREST OF THE STATE OF WASHINGTON

In the State of Washington, there are twenty-five Indian Reservations. Much of the land on these reservations

has passed into nonIndian ownership, pursuant to federal polices which, though initiated in the last quarter of the last century,[1] continue in their effect to this day. According to 1980 census data, some 79,000 persons live within twenty-three of these reservations, of whom some 16,000 are Indians, and the rest, some 63,000, are nonIndians.[2] These reservation residents, Indian and nonIndian alike, require the same sorts of governmental services as all other residents of the State. Such on-reservation services include the provision of roads, police protection, schools and various social services. For example, in Washington there are over 40 separate school districts located in whole or in part within a reservation, serving over 7,000 Indian children.

The State of Washington, accordingly, has a two-fold interest in this case. First, it has a direct interest stemming from the on-reservation activities of its agencies and local governments. To what extent do these activities subject those agencies and local governments to tribal jurisdiction of one sort or another?

Second, the State has a less direct, but no less important interest. It is the same interest as prompted the participation of the State Attorney General as amicus curiae in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Simply put, that interest is in protecting a large

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[1]These policies were principally embodied in the General Allotment Act of 1887, 24 Stat. 388.

[2]See General Population Characteristics, United States Summary, 1980 Census of Population, Bureau of the Census, Table 71, "General Characteristics for American Indian Persons on Reservations and Alaska Native Villages." pp. 1-300 through 1-303. The classification in Table 71, it should be noted, allows only an approximation of tribal and non-tribal members, since some Indians may well not be members of the tribe on whose reservation they reside.

These non-member Indians are, vis-a-vis the Tribe, in the same legal status as nonIndians. Cf *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, at 161 (1980). And our concern, accordingly, extends to them as well. We shall, however, use in this brief the Census Bureau classification, "Indian" and "NonIndian", rather than "member" and "non-member".

group of the State's citizens from the power of a tribal government in which they cannot participate in any way, and whose actions cannot be challenged in a federal court. After *Oliphant*, protection exists in the criminal area. But at least in the Ninth Circuit, little if any such protection exists in the civil area, as the opinion of the Ninth Circuit in this case demonstrates so strikingly.

SUMMARY OF ARGUMENT

This case presents two separate, but closely related, questions. The first involves the existence of a remedy in federal court for an unlawful exercise of jurisdiction by a tribal court over a non-member. The second involves the criteria for determining whether such an exercise of jurisdiction is actually lawful or not.

Because we consider the first question relatively easy of resolution, and the second more difficult, this brief focuses primarily on that second question. And we take it up initially.

Although the District Court characterized that question as one of federal common law, that characterization may be misleading. For it obscures the central issue: What did the Congress intend? Following the approach established in *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973), the Court should, in addressing this issue, avoid reliance upon "platonic notions of Indian sovereignty", and instead examine the applicable treaty and statutory provisions.

The first set of provisions to be examined is found in Article 2 of the Second Treaty of Fort Laramie, 15 Stat. 649 (1868), which established the Crow Reservation "for the absolute and undisturbed use and occupation of the Indians" and forbade nonIndians to "pass over, settle upon, or reside in" the Reservation. Although that language clearly recognizes that the Indians were to continue to govern themselves as before, free from state law, it does not even purport to answer the question involved here: Are

the Indians to govern nonIndians as well? For Article 2 provides that nonIndians were not to set foot on the Reservation at all.

Light is shed on that question, however, by Article 1 of the same treaty, which provides that recompense from nonIndians who harm Indians is a matter for the United States, not the Crow Tribe. Article 1 thus directly addresses the precise question involved here, *viz.*, the power of the Tribe over nonIndian tortfeasors. It shows the Tribe was not to have this power.

When federal policy regarding nonIndian settlement on reservations changed, and nonIndians were in effect invited onto the Crow Reservation by the General Allotment Act of 1887, 24 Stat. 388, and the Crow Allotment Act of 1920, 41 Stat. 751, to settle and become landowners there, those Acts contemplated that the nonIndians would continue to be free from Indian tribal government. For they contemplated the actual elimination of that government, for Indians and nonIndians alike.

The subsequent halting of the allotment process and of the selling of reservation lands to nonIndians, accomplished by the Indian Reorganization Act of 1934, 48 Stat. 984, did not result in nonIndians coming under tribal jurisdiction. The Bureau of Indian Affairs attempted to have such jurisdiction conferred upon tribal governments; but the Act which was actually adopted by the Congress represents a repudiation of that attempt.

Further, this reading of the Indian Reorganization Act is confirmed by an opinion of the Solicitor of the Department of Interior, issued shortly after the passage of that Act. Under that opinion, the inherent authority of a tribal government must be confined to tribal members, who can avoid that authority by severing their tribal membership.

If the authority of a tribal government is not confined to tribal members, serious constitutional issues arise. For it is questionable that the Congress could, under the Bill of

Rights, subject nonIndian reservation residents to a tribal government in which they cannot participate in any way, precisely because of their status as nonIndians and nonmembers.

Montana v. United States, 450 U.S. 544 (1981) confirms our basic submission, viz., that tribal governments have no jurisdiction, civil or criminal, over nonIndians. The exceptions to this general conclusion—exceptions which the Court discusses in *dicta* in *Montana*—are not applicable in this case, and, in any event, must be applied very narrowly, in order to avoid conflict with congressional intent.

Regarding the question of a federal remedy for nonIndians who are subjected to a legally unauthorized assertion of tribal jurisdiction, the federal courts have authority, under 28 U.S.C. § 1331, to provide that remedy. And the Indian Civil Rights Act, 25 U.S.C. §§ 1301 et seq., did not take that remedy away. In the final analysis, that Act has nothing to do with the petitioners' claim in this case. In thinking that it did, the Court of Appeals made a fundamental error.

ARGUMENT

I. INTRODUCTION

Twelve years ago, this Court rejected reliance upon "platonic notions of Indian sovereignty" as a basis for determining the scope of an Indian's immunity from state law. *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 172 (1973). In so doing, the Court stated that one must "* * * look instead to the applicable treaties and statutes which define the limits of state power", with the concept of Indian sovereignty providing only a "backdrop" for the reading of those treaties and statutes. *Ibid.*

McClanahan provides the proper focus here as well. This case involves, to be sure, an effort by an Indian community to assert governmental power over a member or

unit of the nonIndian community and not, as in *McClanahan*, an effort by the nonIndian community to assert governmental power over a member of the Indian community. But that difference does not, we submit, make the platonic notion of Indian sovereignty any more useful here, or concentration upon applicable treaties and statutes any less important.

Indeed, in this case it is especially important to focus upon the applicable treaty and statutory provisions; for the opinions issued so far in this case may represent something of a false start. The opinion of the District Court, the opinion of the court below, and that of Mr. Justice Rehnquist as Circuit Justice, all characterize the question of the scope of the tribal court's jurisdiction over nonIndians as one of "federal common law". And they thus characterize the other question here presented as one of federal court jurisdiction to pass upon an issue of federal common law. See 560 F.Supp. 213, at 215 (E.D. Mont. 1983), 736 F.2d 1320, at 1323 (9th Cir. 1984), and ___ U.S. ___, 105 S.Ct. 7 (Sept. 10, 1984).

This characterization, though not entirely inaccurate, may be misleading. The use of the phrase "common law" reflects an important fact; judge-made law is critically important in resolving the question of tribal court jurisdiction. But that judge-made law should be, in the final analysis, an effort to ascertain the intent of the Congress, as manifested in various federal statutes and treaties, and not an exercise in divining the content of a platonic notion though an exegesis of the Court's former opinions.

Moreover, whether one views the problem of the scope of tribal jurisdiction as one of "common law" or of Congressional intent has important practical consequences. Problems in this area inevitably involve a balancing of federal, state and Indian interests; and it makes a difference whether the Court views its role as that of striking the balance itself, or of ascertaining the balance that Congress has struck.

This is not to suggest that the manner in which the Congress has struck the balance is always clear. Far from it. But to abandon the focus upon Congressional intent is, we believe, to make virtually impossible what is a very difficult task at best.

Furthermore, to recognize that the question ultimately *is* one of Congressional intent is to recognize also that the Constitution may have a bearing on the question, so as to restrict the range of choices open to the Congress in this area, no less than in others.

In the present case, for example, one may ask: Did Congress intend that tribal courts alone, to the complete exclusion of federal courts, should be able to determine whether an assertion of tribal civil jurisdiction over nonIndians exceeds the bounds intended by Congress?

One may also ask: Did Congress intend that tribal civil jurisdiction should extend to non-members of the tribe who have not, in some manner, voluntarily subjected themselves to such jurisdiction, and who cannot, because they are non-members, participate in tribal government in any way?

Phrasing the questions in this manner places in sharp focus our submission that fundamental civil rights are at stake in this case. They are "fundamental" in the original sense of that word; they are embedded in the very foundation of our American governmental system. And they do not become less fundamental because an Indian tribal government, the representative of an historically deprived people, is attempting to eliminate those rights.

One last preliminary point. The approach which we here suggest is precisely that taken by Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). The question there before the Court was whether the State of Georgia had the power to control the right of nonIndians to enter Cherokee territory. To answer that question, the Chief Justice examined in great detail the various provisions of two treaties between the Cherokees and the

United States; viz., the Treaty of Hopewell, 7 Stat. 18 (1785) and the Treaty of Holston, 7 Stat. 39 (1791), together with various Acts of Congress regulating Indian affairs. See 31 U.S. (6 Pet.) at 551-556. From this analysis he concluded that the Cherokees were "* * * a nation admitted to be capable of governing itself." 31 U.S. (6 Pet.) at 556. Accordingly, Georgia's assertion of power violated these provisions.

The Chief Justice, in short, did not start with the platonic notion of tribal sovereignty, and then attempt to ascertain what governmental powers were encompassed by that notion. Rather, he asked what conclusion was required by specific treaty and statutory provisions, and based his conclusion squarely upon those provisions. Thus, the approach we here suggest is hardly new.

We turn, then, to an examination of the treaty and statutory provisions applicable in this case.

II. CONGRESS DID NOT INTEND THAT THE CROW TRIBAL COURT SHOULD HAVE JURISDICTION OVER TORT CLAIMS BY A TRIBAL MEMBER AGAINST A NON-MEMBER.

A. The Treaty Provisions

The Crow reservation was established by the Second Treaty of Fort Laramie, 15 Stat. 649 (1868).[3] Article 2 of the Treaty provides as follows:

> "The United States agrees that the following district of country, to wit: [description of reservation boundaries omitted] *shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named,* and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons, except those herein designated and authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, * * *" (Emphasis supplied)

By this language the Treaty not only vested in the Crows a proprietary interest in the reservations lands, but it established as well the right of the Crows to self-government. They were governing *themselves* before the coming of the nonIndian, and they were to continue to do so afterwards. As this Court said with respect to similar language in the 1868 Treaty with the Navajos (15 Stat. 667):

> "Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in *Worcester v. Georgia,* was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed." *Williams v. Lee,* 358 U.S. 217, at 221, 222 (1959).

So too with the Crows.

But is it also implicit in these treaty terms that nonIndians, as well as Indians, will be subject to the jurisdiction of this tribal government? That is the critical question here. The language of Article 2, however, is of little help in answering that question. For that language clearly contemplated that nonIndians would not be on the reservation at all. With the exception of certain federal agents and employees, nonIndians were simply to stay out.

But what if they did not stay out? Did tribal jurisdiction then apply? While Article 2 does not answer this question, Article 1 does. That portion of the Treaty reads:

[3] The First Treaty of Fort Laramie, 11 Stat. 749 (1851) was entered into by the United States and several Indian Tribes, including the Crows. By that treaty, the signatory tribes acknowledged various designated lands as their respective territories, but did not establish any actual reservation. See *Montana v. United States,* 450 U.S. 544 at 548, 558 (1981). The reservation later created by the Second Treaty of Fort Laramie was subsequently reduced by various statutes to its present area of approximately 2.3 million acres. *Montana, supra,* 450 U.S. at 548.

"* * * If bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, *and also re-imburse the injured person for the loss sustained.*" (Emphasis supplied)

This language clearly negates any possible inference from Article 2 or any other treaty provision that the Tribe itself was to exercise jurisdiction, either criminal or civil, over nonIndians for wrongs committed against Indians.[4]

The Second Treaty of Fort Laramie, in sum, shows no Congressional intent that the Tribe was to have civil jurisdiction of the sort asserted here over nonIndians; indeed, it shows just the opposite intent. The question then becomes: Has Congress, through subsequent acts, changed that intent? As we shall next show, far from changing it, the Congress has reaffirmed it.

B. The Allotment Acts

As we have seen, under the Second Treaty of Fort Laramie nonIndians within the Crow Reservation were generally to be considered as intruders. For the entire reservation was set aside for the "absolute and undisturbed use and occupation" of the Indians. With the General Allotment Act of 1887, 24 Stat. 388, and the Crow Allotment Act of 1920, 41 Stat. 751, that situation changed. NonIndians were, in effect, invited onto the reservation by the Federal Government to become landowners and settlers. See *Montana v. United States*, 450 U.S. 544, at 548 (1981).

[4]By way of contrast, the earliest treaties typically provided that the nonIndian intruder would forfeit the protection of the United States and would be subject to tribal punishment. See, e.g., Article V of the Treaty of Hopewell with the Cherokees, 7 Stat. 18 (1785); see also Article V of the Treaty with the Choctaws, 7 Stat. 22 (1978), discussed in *Oliphant v. Suquamish Tribe*, 435 U.S. 191, at 198, n. 8 (1978).

As noted in *Montana*, as a result of this change in policy, the State of Montana itself now owns two percent of the reservation land in fee simple. *Ibid.* And as noted by the District Court, the accident involved in this case took place on part of this State-owned land. (See 560 F.Supp. 213, at 214.

In *Montana*, the Court made an extensive review of the intent and purpose of the Allotment Acts as shown by their legislative history. See *Montana*, 450 U.S. at 559, n. 9. The Court noted that "[T]he policy of the Acts was the eventual assimilation of the Indian population", and the concomitant "* * * dissolution of tribal relations." *Ibid.* The Court then concluded:

"There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction. [citations omitted] *It defies common sense to suppose the Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction* when an avowed purpose of the allotment policy was the ultimate destruction of tribal government." (Emphasis supplied) *Ibid.*

Thus, even if, contrary to our initial submission, Congress intended in the Treaty that the Crows have jurisdiction of the type here asserted, the Allotment Acts show that Congress changed its intent.

C. The Indian Reorganization Act

In 1934, Congressional policy shifted once again, in the Indian Reorganization Act, 48 Stat. 984 (25 USC § § 461 et. seq.) The legislative history of that Act is no less important than the legislative history of the Allotment Acts. For it shows that Congress continued its prior policy of denying to Indian Tribes any general civil jurisdiction

over nonIndians, while reversing, however, the prior policy of alienating lands to those nonIndians.

The Indian Reorganization Act, as originally introduced in Congress, was a very different measure from that which eventually passed. The original version was introduced in the House as H.R. 7902, 73rd Cong., 2nd Sess. (1934) and in the Senate as S. 2755, 73rd Cong., 2nd Sess. (1934).

The heart of the bill was Title I, "Indian Self-Government." Section 2 of Title I read, in pertinent part, as follows:

> "In accordance with the foregoing purposes, the Secretary of the Interior is hereby authorized to *issue* to the Indians residing upon any Indian reservation or reservations or subdivision thereof a *charter granting to the said community group any and all such powers of government * * * as may seem fitting in the light of the experience, capacities, and desires of the Indians concerned * * **" (Emphasis supplied)

Section 4 then spelled out in more detail the powers which were to be included in the charter. The first is found in subsection (a):

"(a) To organize and act as a *Federal municipal corporation,* to establish a form of government, to adopt and thereafter to amend a constitution, and to promulgate, and enforce ordinances and regulations for the effectuation of the functions hereafter specified, *and any other functions customarily exercised by local governments.*" (Emphasis supplied)

Subsection (d) granted another important power:

"(d) To establish courts *for the enforcement and administration of ordinances of the community,* which courts shall have *exclusive jurisdiction over all offenses of, and controversies between, members of the chartered community, under the ordinances of such community, and jurisdiction exclusive or non-exclusive over all other cases arising under the ordinances of the community,* and shall have power to render and

> enforce judgments, criminal and civil, legal and equitable, and to punish violations of local ordinances by fine not exceeding $500, or in the alternative, by imprisonment for a period of not exceeding six months: * * *" (Emphasis supplied)

Title IV of the original bill also dealt with courts, establishing a Court of Indian Affairs. Section 3 of this Title spelled out the broad jurisdiction of that court, which included jurisdiction "of all cases, civil or criminal, arising under the laws and ordinances of a chartered Indian community, wherein a real party in interest is not a member of such community." (Subsection 4)

Clearly, under this proposed legislation, a chartered Indian community was to have broad legislative jurisdiction over non-members—as broad as those of any municipal corporation or other unit of local government. And the tribal courts and the Court of Indian Affairs would have jurisdiction over non-members as well.

Title I and Title IV, however, did not survive. And a major reason was that the chairman of the Senate Committee on Indian Affairs, Senator Wheeler from Montana, was adamantly opposed.

In the hearing on S. 2755, the following exchange took place concerning Title I:

> "The Chairman. Well, you might possibly, Mr. Commissioner, get, for instance, some tribe of Indians in Montana who would want to try this, and they might have a sufficient number of signers to a petition to have a charter issued.
>
> "Commissioner Collier [of the Bureau of Indian Affairs]. Yes.
>
> "The Chairman. But if they did do it, in my judgment, it would bring about all kinds of conflicts between your Indians and the white people, and, in addition to that, it would set back the Indians, in my judgment, considerably by doing it, and I am afraid that it would lead to conflicts in the Northwest between the Indians and the whites.

"I mean, supposing the Indian Bureau went out there, for instance, if you had this provision in there, your Indian Bureau could go out there and take those Indians possibly and propagandize them and get sufficient numbers of them to sign it and issue a charter, and then attempt to set up this government within a government out there, which would be, in my judgment, a serious mistake on the part of the Indians to do it." Hearing Before the Committee on Indian Affairs, United States Senate on S. 2755, 73rd Congress, 2nd Sess. (1934) p. 68 (hereinafter "1934 Hearings").

Senator Wheeler liked the proposed court system in Article IV no better. Under discussion was an amendment, proposed by the BIA, involving the criminal jurisdiction of the court:

"Commissioner Collier. Mr. Chairman, this amendment would leave with the proposed new court of Indian affairs all prosecutions for crimes insofar as they are prosecutions under the laws affecting Indian country.

"The Chairman. Yes; but it is perfectly ridiculous to set up this separate court." 1934 Hearings, p. 205.

The discussion then turned to the jurisdiction of the court, in the case of a nonIndian trying to collect a debt from an Indian. And Senator Wheeler expressed his views about the proposed court once again.

"The Chairman. If you ever get this through Congress I will be surprised, because it is perfectly ridiculous in my judgment.

"Senator O'Mahoney. Senator, I don't think you agree with this provision.

"The Chairman. Well, I certainly do not agree with it, and I do not think the Indians if they understood it in the Northwest would want it, because of the fact that it would just simply hamper them and retard them rather than do them any good.

"Commissioner Collier. Mr. Chairman, we have explained that we did not regard this section as an integral part of the bill, as indispensable at all.

"The Chairman. Yes; I am glad of that." 1934 Hearings, p. 208.

What happened next is best explained in Senator Wheeler's own words:

"The Chairman. * * * I got together with the Commissioner of Indian Affairs and went over the important points that I thought were in controversy, and yesterday they sent up this bill, which eliminates, it seems to me, practically all of the matters that are in controversy, * * *" 1934 Hearings, p. 237.

The bill which the BIA sent up was the bill which ultimately passed. (Compare S. 3645, reproduced at 1934 Hearings, p. 234, and Act of June 18, 1934, 48 Stat. 984). Thus the Congress, in 1934, denied to the Indians the broad, general governmental powers over nonIndians which the BIA has hoped to attain. And that fact is reason enough for this Court to deny the claim to any such powers now.

D. The Understanding of the Executive

The understanding of the Executive Branch has been consistent with that of the Congress. In 1934, shortly after passage of the Indian Reorganization Act ("Wheeler-Howard" Act), the Solicitor of the Department of Interior, Mr. Margold, was squarely faced with the question of the extent of an Indian Tribe's inherent sovereign power over non-members. The specific question was the extent of a Tribe's inherent power of eminent domain. Op. Sol. I.D. Ind. Aff. 1917-1974, Vol. I, 484, 489-491, Question 9 (M-27810, Dec. 13, 1984), entitled "Wheeler-Howard Act — Interpretation."[5]

The opinion first considered the source of this tribal power.

"The power of eminent domain is one of the usual

[5]This important opinion remained unpublished until issuance of this two-volume compilation.

powers of sovereignty. It is, as the United States Supreme Court held in *Cincinnati v. Louisville and Nash R.R. Co.*, (223 U.S. 390, 404), 'one of the powers vital to the public welfare of every self-governing community.'

"No Federal statutes terminating the exercise of this power by an Indian tribe are known. Therefore, under the doctrines advanced in the recent opinion of this Department on 'Powers of Indian Tribes' (M-27781, approved October 25, 1934), the power of eminent domain is one of those powers which are vested in an Indian tribe within the meaning of Section 16 of the Wheeler-Howard [Indian Reorganization] Act." *Ibid.*, at 489.

Yet Solicitor Margold nevertheless then concluded:

"I am of the opinion that the Indian Service is correct 'in assuming that a tribe organized under section 16 may exercise the power of eminent domain in the acquisition of land as against its members, *but not in the case of land owned in fee by non-members.*'" *Ibid.* (Emphasis supplied)

The inherent power of eminent domain, which is "one of the usual powers of sovereignty", may thus be exercised only with respect to tribal members.

From this, Solicitor Margold drew another important conclusion.

> "It is proper to add that since the tribal power of condemnation is based, in the first instance, upon tribal jurisdiction over the members of the tribe, it ceases to exist where an Indian abandons his tribal membership; and as was said in the opinion of this Department on "Powers of Indian Tribes," (M-27781, approved October 25, 1934, at page 36), 'any member of any Indian tribe is at full liberty to terminate his tribal relationship whenever he so chooses.' * * *
>
> "Threatened oppression in the form of condemnation, taxation, or other incidents of social control may be avoided by the termination of the landowner's tribal status. But if he remains to share in the benefits of tribal live he must bear its burdens.

> "The restricted land of the Indian who has severed his tribal affiliation is not subject to tribal condemnation proceedings under tribal law." At 490.

NonIndians are in the same status as the Indian who has severed his tribal membership, as the opinion goes on to make clear.

> "Accordingly, patented land may be condemned, as it may be taxed on exactly the same basis as the lands of non-Indians. An Indian tribe will have whatever rights of condemnation the laws of the State may give to it.
>
> "* * *
>
> "Land held in fee, therefore, whether owned by Indians or by non-Indians, may be condemned by an Indian tribe only in accordance with State law, through proceedings brought in State courts. At 490, 491."

This opinion thus explicitly recognized that a tribal claim of general governmental power, whether it involves condemnation, taxation, or any other form of civil jurisdiction, is valid only with respect to tribal members. The opinion also recognized that our system of government has no room for "threatened oppression in the form of condemnation, taxation, or other incidents of social control" over those non-members.

E. Constitutional Considerations

The reference to "threatened oppression" in Solicitor Margold's opinion serves as a reminder that important constitutional issues are here involved. We are not suggesting that they need final resolution here; but they certainly form a "backdrop" which is no less important than the backdrop of tribal sovereignty which is to be considered here.

Tribal governments are not subject to the Bill of Rights, which governs the conduct of the Federal Government, or to the Fourteenth Amendment, which governs that of the States and its political subdivisions. *Talton v.*

Mayes, 163 U.S. 376 (1896). This is because Indian Tribes, unlike political subdivisions of a State, do not exercise power delegated by a superior sovereign. *United States v. Wheeler*, 435 U.S. 313 (1978).

But if, as we submit, the ultimate controlling factor in this case is congressional intent, the Bill of Rights surely controls the permissible scope of that intent. And this gives rise to an obvious problem. How can it be permissible for Congress to intend—and thereby bring about—a system of government which itself would surely be constitutionally impermissible to the extent that non-members who are subject to it cannot possibly participate in it, through the voting franchise or otherwise?[6]

Talton v. Mayes, supra, shields tribal governments from the Bill of Rights; but it does not shield the Congress.[7] Further, it is not just a question of Congress tolerating the continued existence of tribal governments through inaction. If tribal governments are to be true governments, recognizable as such by the federal courts, they must first be recognized as such by the Congress, in a treaty or statute, or by the Executive pursuant to congressional authority. Absent congressional action, the problem does not even arise. And that fact is itself a large part of the problem.

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[6]We recognize that the Crow Tribe is here asserting jurisdiction over a political subdivision of the State of Montana, and not a natural person. But surely the jurisdictional issue must be resolved in a manner which applies to natural persons as well, i.e., to nonIndian reservation residents in the same status as those involved in *Montana v. United States*.

[7]The applicability of the Constitution to the congressional exercise of its treaty-making power with the Indians, and the constitutional difficulties in a broad grant of tribal jurisdiction over nonIndians, were recognized by the Attorney General of the United States 150 years ago. In 2 Op. Atty. Gen. 693 (1834), relied upon in *Oliphant*, 435 U.S. at 199, the Attorney General stated, with regard to the treaty of Dancing Rabbit (7 Stat. 33), entered into with the Choctaws in 1830:

> "For the more effectual accomplishment of the same end [creation of a territory for the Choctaws west of the Mississippi], the government and people of the United States, by the 4th article of the treaty, engaged to 'secure to the Choctaw nation of red people the jurisdiction and government of all the persons and property that may be within their limits west.' If this provision had stopped here, it would have indicated an intention on the part of the framers of the treaty to give to the Choctaws a jurisdiction and government exclusive of all interference by the United States, or any other authority, and broad enough to authorize the particular proceedings now before me; *though it is by no means clear that such a treaty could have been made, or would be valid, under the constitution of the United States.*" 2 Op. Atty. Gen. at 694. (Emphasis supplied)

This constitutional issue is really a form of the familiar "state action" issue. Cf. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). And Solicitor Margold's opinion points the way, we believe, to a solution. Tribal government can apply only to tribal members; but those members are perfectly free to avoid the jurisdiction of that government by becoming non-members. That solution, we suggest, is consistent with the understanding of the framers of our Constitution as construed in *Talton v. Mayes*, i.e., that tribal governments were to continue, if Congress so wished, just as they were before the adoption of that Constitution, exercising jurisdiction over members only, unfettered by the Constitution itself. And it assures that non-members will not be deprived of the benefit of the Bill of Rights.[8]

F. The Applicability of Montana v. United States

In *Montana*, this Court held that the Crow Tribe did not have the power to prohibit or otherwise regulate hunt-

---

[8]In an opinion issued on Oct. 25, 1934, shortly before his Dec. 13, 1934 opinion discussed above, Solicitor Margold did recognize a type of civil jurisdiction even over non-members. In "Powers of Indian Tribes", he stated that the tribal taxing power "* * * may be exercised over members of the tribe and over non-members, so far as non-members may accept privileges of trade, residence, etc., to which taxes may be attached as conditions." 55 ID 14, at 46 (1934). So long as the tribal sanctions are confined to withdrawal of the privileges, we see no constitutional problems in this position, or any inconsistency with Solicitor Margold's subsequent opinion of Dec. 13, 1984.

ing and fishing by nonIndians on nonIndian lands within the Crow Reservation. This holding and its rationale are, we submit, consistent with our submission and controlling here. We expect that the Petitioners will discuss *Montana* at some length and we need not duplicate that discussion.

One portion of the *Montana* opinion, however, requires comment. The Court concluded that the principles applied in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), rejecting a tribal claim of inherent authority to exercise criminal jurisdiction over nonIndians, were generally applicable to an assertion of civil jurisdiction as well. *Montana*, 450 U.S. at 565. But the Court then went on to spell out in *dicta* two exceptions to this general conclusion.

> "To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on the non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. *Williams v. Lee, supra*, at 223; *Morris v. Hitchcock*, 194 US 384; *Buster v. Wright*, 135 F. 947, 950 (CA8); see *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 US 134, 152-154. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. See *Fisher v. District Court*, 424 US 382, 386; *Williams v. Lee, supra*, at 220; *Montana Catholic Missions v. Missoula County*, 200 US 118, 128-129; *Thomas v. Gay*, 169 US 264, 273; * * *" *Montana*, 450 US at 565, 566.

For the reasons discussed in the instant case by the District Court, however, neither exception is applicable in this case. See 560 F. Supp. 213, at 216, 217. As there pointed out, this dispute involves no contract, lease, or other commercial arrangement. Nor does denial of the

tribal power here realistically threaten the political integrity, economic security, or health or welfare of the *Tribe*.

If this Court is inclined to construe these exceptions more broadly than did the District Court and find them applicable here, then additional questions arise. Do these exceptions really have a basis in statutory or treaty provisions? If so, what are those provisions? For again, the issue of the Tribe's jurisdiction is ultimately one of congressional intent, not common law.

To be more specific, we see no difficulty with the proposition that nonIndians may voluntarily submit themselves to tribal jurisdiction. The situation in *Williams v. Lee*, 358 U.S. 217 (1959) provides the clearest illustration of this point. A nonIndian wished to sue a reservation Indian for a debt. The Court held that the Indian debtor could not be sued in state court. As a result, the nonIndian creditor was left with the choice of suing in tribal court, or not suing at all.

Similarly, a Tribe might condition the privilege of doing business with the Tribe or its members upon a voluntary submission to tribal jurisdiction over that business, though the submission should not be implied after the fact, but be based upon a conscious choice, as in the *Williams v. Lee* example. And if the first part of the *dicta* in *Montana* is so confined in its application, it is unexceptionable and not inconsistent with congressional intent.

With respect to the second part, an approach similar to that adopted for state and local governments in *National League of Cities v. Usery*, 426 U.S. 833 (1976) might be adopted for Tribes as well. This approach might result in certain types of tribal jurisdiction over nonIndians being necessary to preserve the integrity of tribal government as such, though we are frankly hard put to imagine actual examples which would not involve a voluntary submission of the *Williams v. Lee* type discussed above.

Extending the application of the *dicta* in *Montana* beyond these narrow limits would entail problems of con-

sistency with congressional intent and, no less importantly, of consistency with basic constitutional rights.

III. THE COURT OF APPEALS ERRED IN HOLDING THAT THE DISTRICT COURT DID NOT HAVE JURISDICTION UNDER 28 U.S.C. § 1331.

The question of the District Court's jurisdiction can be disposed of briefly. In denying federal question jurisdiction under 28 U.S.C. § 1331, the Court of Appeals misapplied *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1977). Relying upon *Santa Clara*, the court stated:

> "In asking that we recognize a civil cause of action arising under federal common law, National is requesting that we supplement a remedy Congress intended to be exclusive, and that we do so without statutory authority." 736 F.2d 1320, at 1323.

Santa Clara involved a claim by a tribal member against a Tribe based upon an alleged violation of the Indian Civil Rights Act (ICRA), 25 U.S.C. § § 1301 et. seq. The tribal member had no federal remedy before the passage of the ICRA and the Court held that the ICRA did not create one. For the reasons discussed by Mr. Justice Rehnquist in his opinion as Circuit Justice in this case, ___ U.S. ___, 105 S.Ct. 7 (Sept. 10, 1984), it is highly questionable that the *Santa Clara* rationale would apply to a claim by a non-member.

Moreover, as we understand the Petitioners' claim and the District Court's ruling on that claim, the ICRA, in the final analysis, has nothing to do with the matter at hand. The basic claim is not that the tribal court exercised jurisdiction in a manner which violated the ICRA. Rather, it is that the tribal court exercised jurisdiction which it did not have at all.

It is the existence of that jurisdiction in the first place, not the manner of its exercise, which is at issue here. And that fundamental issue is within the District Court's jurisdiction under 28 U.S.C. § 1331. A federal remedy ex-

isted before passage of the ICRA; and the ICRA did not take that remedy away.

CONCLUSION

For the reasons given above, the judgment of the Court of Appeals should be reversed.

RESPECTFULLY SUBMITTED this 18th day of January, 1985.

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FILED
FEB 15 1985
ALEXANDER L. STEVAS.
CLERK

No. 84-320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES; AND LODGE GRASS SCHOOL DISTRICT NO. 27,

Petitioners,

v.

CROW TRIBE OF INDIANS; LEROY SAGE, A MINOR; FLORA NOT AFRAID, HIS GUARDIAN; THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; EDDIE ROUNDFACE, GLEN BIRDINGROUND, AND IRA LEFTHAND, JUDGES OF THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; CROW INDIAN TRIBAL COUNCIL; AND DONALD STEWART, CHAIRMAN OF THE CROW INDIAN TRIBAL COUNCIL,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF FOR RESPONDENTS LEROY SAGE AND FLORA NOT AFRAID

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58 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether there is a federal claim for relief against Indian Tribal Governments that unlawfully assert civil jurisdiction over non-Indians.

2. Whether the Tribal Court of the Crow Indian reservation has jurisdiction over claims that involve the state of Montana (or its subdivisions), that arise on state owned land, and that occur in connection with activities that are compelled or encouraged by state and federal law or policy.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURSIDICTION	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THE COURT OF APPEALS CORRECTLY FOUND THAT THE PETITIONERS COMPLAINT FAILS TO STATE A CLAIM FOR FEDERAL RELIEF	5
A. Congressional Intent	5
1. Indian Self-Government	6
2. District Court As An Appellate Court	10
3. Injunctions	11
4. Federal Indian Law	13
5. Exhaustion Of Tribal Remedies	13
B. Federal Common-Law	14
II. CONGRESS INTENDED THAT THE CROW TRIBAL COURT SHOULD HAVE JURISDICTION OVER TORT CLAIMS BY A TRIBAL MEMBER AGAINST A NON-MEMBER	14
A. Introduction	14
B. Pre-Treaty Crow Tort Jurisdiction	15
C. The Treaty Of 1825	15
D. The Treaty Of 1851	16
E. The Treaty Of 1868	17
F. The Non-Indian Comes Into The Reservation, "Cattle Barons"	20
G. The Organic Act Of 1864, Enabling Act And Constitutions Of The State Of Montana	23
H. The Organization Of Lodge Grass School District No. 27	26
I. The Indian Reorganization Act Of 1934	31
J. Modern Congressional Intent	32

Table of Contents Continued

	Page
III. THE EXECUTIVE BRANCH HAS ACTED CONSISTENT WITH THE INTENT OF CONGRESS	33
IV. THE JUDICIAL BRANCH HAS CORRECTLY INTERPRETED THE INTENT OF CONGRESS	35
A. Introduction	35
B. The Limitation To Tribal Entities	36
C. Interest Analysis	39
1. The Obligation To Provide A Forum	39
2. Protection Of Tribal Interests	40
3. Conformity To Tribal Standards Of Conduct	40
4. Right Of Reservation Indians To Govern Themselves	41
5. Availability Of A Forum	41
V. THERE IS NO STATE INTEREST REQUIRING A DENIAL OF CROW TORT JURISDICTION	42
A. Introduction	42
B. Sovereign Immunity	43
C. The Obligation To Operate A School	47
D. The Constitutional Considerations	48
VI. THE CROW TRIBAL COURT HAS ADJUDICATED WITH EQUITY AND JUSTICE	49
CONCLUSION	49

TABLE OF AUTHORITIES

CASES: Page

Atlantic Coast Line Railroad, Co. v. *Brotherhood Of Locomotive Engineers*, 398 U.S. 281, (1970) 10

Babbitt Ford v. *Navajo Indian Tribe*, 519 F. Supp. (1981) 41

Carl Laemmle Music Co. v. *Stern*, (DC-NY), 209 Fed. 129 Nlft 219 Fed. 534 (1913) 10

Cardin v. *De La Cruz*, 671 F. 2d. 363 (9th. Cir. 11982), U.S. Cert Den. 103 S.Ct. 293 41

Clark v. *United States*, 99 U.S. 382 (1979) 20

Crawford v. *Roy*, 176 Mont. 277 42

Ex Parte, McKardle, 7 Wall 506 8

Fisher v. *District Court*, 424 U.S. 472 (1924) 40, 42

Georgia v. *Chattanooga*, 264 U.S. 472 (1924) 44, 46

Kennerly v. *District Court*, 400 U.S. 423 (1971) 32-33, 40, 42

Lion Bonding & Surity Co. v. *Karatz*, 262 U.S. 77 (1923) 10

Marrion v. *Jicarrila Apache Tribe*, 455 U.S. 130 (1982) 11, 15, 19, 40

Martin v. *Hunters Lessee*, Wheat, 304 (1981) 8

McClanahan v. *State Tax Commission of Arizona*, 411 U.S. 164, (1973) 19, 36, 37, 44

Milwaukee v. *Illinois*, 451 U.S. 304, (1981) 14

Moe v. *Confederated Salish, Kootenai Tribes*, 425 U.S. 463 (1976) 28

Montana v. *United States*, 450 U.S. 544 (1981) .... *passim*

Moore v. *Pate*, 29 F.2d. 616 (1933) 10

Moran v. *Sturges*, 154 U.S. 256, (1923) 11

Morton v. *Mancari*, 417 U.S. 535, (1974) 35, 41

National Farmers Union v. *Crow Tribe of Indians*, 736 F2d. 1320 (1984) 13

Navada v. *Hall*, 440 U.S. 419 (1979) 43, 46

Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978) 17-18

Parden v. *Terminal Ry. Co.*, 377 U.S. 184 (1964) .. 43, 46

Table of Authorities Continued

Page

Rooker v. *Fidelity Trust Co.*, 263 U.S. 413 (1922) 10

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State Ex Rel. Flammand v. *Flammand*, ___ Mont. ___, 621 P2d., 471 (1980) 33, 42

Swift Transportation v. *John*, 546 F. Supp. 1185, (D. Ariz., 1982) 35-36, 37, 38

United States v. *Kagma*, 118 U.S. 375, (1886) 45, 48

United States v. *Mazurie*, 419 U.S. 544 (1975) 19, 35, 41, 46

United States v. *Wheeler*, 435 U.S. 313 (1978) 11

Washington v. *Confederated Tribes of the Colville Reservation*, 477 U.S. 134, (1980) ..... *passim*

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Worchester v. *Georgia*, 6 Pet. 515, 557 (1832) ... 11, 44, 46

STATUTES:

25 UNITED STATES CODE: Page

§ 450 32

§ 461 31

§ 1302 32

§§ 1321-1326 ..... 33, 42, 45

§ 1322 ..... 32, 42, 45

§ 1332 ..... 32, 42

§ 1451 32

§ 1901 ..... 32, 41

28 UNITED STATES CODE:

§ 1254(1) 1

§ 1331 ..... *passim*

§ 1345 8

§ 1362 8

§ 2283 11

Table of Authorities Continued

Page

MONTANA CODE ANNOTATED:

2-9-102 M.C.A. 47

Organic Act Of The Territory of Montana Of 1864, 13 Stat 85 ..... 5, 23, 24, 27, 45

Enabling Act Of The State Of Montana, 255 Stat 676 ..... 23, 25, 27, 45.

Act of April 11, 1882, 22 Stat 42 21

CONSTITUTIONS:

Constitution Of Montana, 1889, Ordinance No. 1 26

Constitution Of Montana, 1972, Article I 46

United States Constitution, Article I 26

United States Constitution, Article III 5, 8, 48

United States Constitution, Amendment 10 5

TREATIES:

Treaty with the Crow Tribe, 1825, 7 Stat 266 ..... 15, 18, 24, 27

Treaty of Fort Laramie with Crow & Etc., 1851, 11 Stat 749 ..... 16, 18, 27

Treaty with the Crows, 1868, 15 Stat. 667 .. 17, 19, 20, 27

Agreement with the Crows, 1880, (May 14, 1880)

Kappler, Laws and Treaties, Vol II, p. 1063 21

MISCELLANEOUS:

Bradley, *After The Buffalo Days*, (1972) 21-22

Big Horn County Historical Soc. *Lookin' Back*, (1976) ..... *passim*

Canby, *American Indian Law*, (1981) 39

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Table of Authorities Continued

Page

17 Op. Atty. Gen. 134 (1881) 34

23 Op. Atty. Gen. 214 (1900) 34

55 Ind. Dec. 14, 50 (1934) 34

Op. Sol. Int., Oct. 13, 1976 34

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 736 F.2d 1320 (1984) and is reproduced in the Appendix to the Petition at 1a. The opinion of the District of Montana is reported at 560 F. Supp. 213 (1983) and is also reproduced in the Appendix to the Petition.

JURISDICTION

The judgement of the Court of Appeals was entered on July 3, 1984. The Petition for Certiorari was timely filed with this Court on August 29, 1984. This Court granted certiorari as to both questions presented for review. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) (1982).

28 U.S.C. § 1331 provides in relevant part for jurisdiction in the Federal Courts over civil causes of action that arise "under the Constitution, laws, or treaties of the United States."

STATEMENT OF THE CASE

As a preface to our statement of facts, we note that we dispute some of the facts set forth in the Petitioners' brief. We believe some of these errors are critical and will point them out and correct them as necessary to support our argument. We also preface by noting we will supplement the record with some facts of general history and public record of our area. We do so respectfully, noting that this court has taken judicial notice of such things in the past. See footnote 7 below.

May 27, 1982, Leroy Sage, a minor member of the Crow Tribe was injured in the parking lot next to the school of the Petitioner, (National) Lodge Grass School District

No. 27. The accident occurred on fee land owned by the district.[1]

The record is silent on how these injuries occurred[2] and as to what the incurred and future medical bills would total.[3] Sage and his guardian, Flora Not Afraid (Not Afraid), filed a negligence suit against the school district in Crow Tribal Court. Tribal process was served on the chairman of the school board, but the school district failed to answer Not Afraid's complaint or to appear in tribal court to contest it's jurisdiction. Not Afraid ultimately obtained a default judgement against the school district. Upon receiving notice of the default judgement, the

[1] National states there is a "mineral reservation therein held by the Crow Tribe." Pet. Brief at 3. This is not supported by the record, and in fact is false. The original patent from the United States has no reservation of minerals whatsoever. Patent No. 16072 dated January 5, 1911, recorded in the office of Clerk and Recorder of Rosebud County, Montana, on June 25, 1912, Bk. 9 p. 550.

It is also not in the record, nor is it true, that the land was given pursuant to the Crow Allotment Act of 1920 S16. See Pet. Brief at 4. A warranty deed shows the school purchased the land in 1918 for $750.00, *two years prior to the Allotment Act*. Instrument No. 12496, dated June 24, 1918, recorded in the office of the Clerk and Recorder of Big Horn County, Montana, December 23, 1918, Bk. 8 p. 250.

[2] The Petitioner asserts that Sage was struck by an *uninsured motorcyclist*. Again the record does not support this finding. See Pet. Brief at 4. We are not aware of the source for such statements. Excerpts of record filed with Ninth Circuit Nos. 5, 13, & 24 do not allude to these purported facts. We are not aware of the source for such statements.

[3] Here again Petitioner is mistaken. The record does not support the finding. Although the district court made such a finding no evidentiary hearing was ever held. The pleadings of Petitioner in the district court do not allege what these expenses were. There is no basis for the district court finding.

school district notified it's insurer, National Farmers Union (National), of the tribal suit. Neither the school district nor National contested the default judgement in Crow Tribal Court, (See Crow Tribal R. Civ. Proc. Rule 17(d), Joint Appendix at JA-17), or sought an appeal to the Crow Tribal Court of Appeals (See Crow Tribal Code § 31-1-103; Crow Tribal R. App. Proc., Joint Appendix at JA 33). Instead, National obtained a temporary restraining order from a federal district court prohibiting Not Afraid from enforcing her default judgement, and filed suit against the Crow Tribe, The Crow Tribal Council, The Crow Tribal Judges, and the Chairman of the Tribal Council, seeking a permanent injunction alleging federal jurisdiction under 28 U.S.C. § 1331 as a case involving a federal common law question.

The District Court, upon motions of Respondents to dismiss for lack of subject matter jurisdiction, found it had jurisdiction, and because it found the tribal court had no jurisdiction, it, without a hearing on the merits, issued a permanent injunction.

The Respondents appealed and the Ninth Circuit Court of Appeals reversed finding that National failed by their complaint to state a federal claim under 28 U.S.C. § 1331.

This Court granted National's petition for certiorari raising the questions of federal review of tribal court decisions, and the scope of tribal court jurisdication.

SUMMARY OF ARGUMENT

We believe this case presents two separate, but closely related questions. The first involves the existence of federal remedy. The second, more importantly, involves whether the Crow Tribal Court has the jurisdiction it asserts.

As to the existence of a federal remedy, we agree with the Court of Appeals. National simply failed to plead properly. This should not be confused with the label that has been attached to that decision that the tribal court became "the first and last arbiter of it's own jurisdiction." Pet. Brief at 6.

This pleading failure occurred because National misunderstands the intent of Congress, and specifically the scope of the District Court jurisdiction under 28 U.S.C. § 1331. The power to decide a federal "common-law question" is limited.

It is first limited by Congress' intent over Indian affairs. Congress intends to foster Indian self-government by forbidding the District Court to, in effect, become an appellate court over the Tribal Court. Furthermore, it did not intend that the District Court could use the injunction power to cripple and nullify the orderly functions of the tribal court system. Finally, it did not intend that federal court review of federal questions be available until tribal remedies are exhausted. The District Court violated all these principles of Congressional policy by it's construction of the meaning of § 1331.

These policies, coupled with the fact that recognition of a cause of action arising under federal common-law is an unusual course, to be approached cautiously, combine to make it clear that neither Congress, nor this Court approve a construction of § 1331, which would afford a federal remedy under the circumstances of this case.

As to the second question—the scope of tribal civil jurisdiction—we will scan the entire history of the Crow "Nation" and find that the Crows held and exercised jurisdiction over torts of non-Indians against Crows from the earliest times until the commencement of this case.

The treaties and acts of Congress clearly and consistently evidence this fact. Consistent with this fact, the non-Indians entered "Crow Territory" only with the permission of the Crows and on Crow terms. The Organic Act of 1864, creating the Montana Territory, The Enabling Act, and the two Constitutions of Montana evidence that non-Indian citizens of Montana recognized this limitation and agreed to be bound by it.

In addition to Congressional intent, it is evident that the Executive Branch and the Judicial Branch also recognize this tort jurisdiction of Indian tribes.

Also, there exists no state interest requiring a limitation upon Indian civil jurisdiction.

Finally, we will show that the Crow Tribal Court is a modern, capable court which has in this case exercised its jurisdiction wisely and justly. It will, in the future, dispense equality and justice to all who come before it, including National. It ought to be allowed to do so.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY FOUND THAT PETITIONERS' COMPLAINT FAILS TO STATE A CLAIM FOR FEDERAL RELIEF.

A. Congressional Intent

The District Court has only limited jurisdiction. Its power must come from the Constitution. U.S. Const. Amend. 10. Article III gave only the Congress the power to ordain and establish the District Court as an inferior court to this Court.

Congress exercised this power, giving the District Court original jurisdiction of certain civil actions arising under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331. The Petitioners, by amended

complaint, alledged § 1331 jurisdiction in the District Court, claiming they raised a federal common-law question because the scope of tribal court civil jurisdiction is a question arising under the Constitution, laws, and treaties of the United States. The District Court found that the complaint stated a federal claim; the Court of Appeals did not. This Court granted certiorari to settle the question.

Respondent, Not Afraid, believes that Congress did not intend such a claim to be a § 1331 federal claim. The reasons for her belief are given in this section.

As stated above, only Congress can define the limits of the jurisdiction of the District Court. We will look at the statutes and cases to determine that intent. Our search reveals the following Congressional policies against holding that National's claim is a federal claim.

1. Indian Self-Government.

First, Congress has limited intrustion by federal courts upon tribal adjudications. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, at 67-70, (1978). To emphasize the clarity, scope, and importance of this Congressional policy, a short review of some of this Court's findings in *Santa Clara Pueblo* seems in order, even at the risk of impropriety.

Although *Santa Clara Pueblo* involved the narrow question of whether a federal cause of action existed for enforcement of the rights created by the ICRA, this Court noted a *general* "Congressional purpose to protect tribal sovereignty from undue interference." *Ibid.*, at 63. Due note was made that Congress provided "for strengthening certain tribal courts." *Ibid.*, at 64. Tribal Courts were "recognized as appropriate forums for the exclusive adjudication of disputes affecting important

personal and property interests of both Indians and non-Indians." *Ibid.*, at 65. This Court even noted, while considering Congressional intent, that judgements of tribal courts, in some circumstances are entitled to full faith and credit in other courts. *Ibid.* fn 21. A review of legislative history revealed that various proposals for District Court review of tribal court decisions were rejected by Congress in favor of tribal court autonomy. *Ibid.*, at 66-72.

We share National's desire for federal court review of federal questions. But, the question before this Court is a limited one—whether National's complaint plead a federal remedy. It's failure to properly plead should not be viewed as a total denial of federal review of federal questions as is shown in the next paragraph.

We share the concern of Mr. Justice Rehnquist that the Court of Appeals decision be read so as to leave National with "no federal court remedy of any kind." ___ U.S. ___, 105 S. Ct. 7 (September 10, 1984). However, we respectfully believe that National had ample access to federal remedies without resort to § 1331 and an injunction against Not Afraid and the Crow Tribal Court. At least three opportunities are evident.

First, it must be remembered that National was the Plaintiff in the District Court. It was free to alledge any basis for jurisdiction and seek any remedy it deemed appropriate. It was not at the mercy of either Not Afraid or the Tribal Court. A similar dilemma faced the Fish and Game Department of Montana (a political subdivision like the Petitioner, Lodge Grass School District #27) when the Crow Tribe attempted to regulate fishing on the Big Horn river. Although the controversy eventually reached this Court, *Montana* v. *United States*, 450 U.S. 544 (1981), the parties, including the Fish and Game Department, the Crow Tribe and the United States, were able

to, in an orderly and respectful manner as to all those entities, litigate the case as a declaratory judgment action under 28 U.S.C. § 1345. National has not shown that the United States would have refused to bring such an action to resolve this case. The United States is still a fiduciary for the Crow Tribe, and as such, is just as interested in determining the scope of the power of the Crow Tribe to regulate fishing. The fact that it is appearing as Amicus seems to be proof of its desire to litigate this case. Apparently National, instead of seeking a remedy through assistance from the United States, decided too hastily to seek the harsh remedy of injunction under § 1331.

Second, the same reasoning is applicable to an action under 28 U.S.C. § 1362, authorizing suit by an Indian tribe if it arises under the constitution, laws, or treaties of the United States. Again, it does not appear that National attempted to persuade the Crow Tribe to participate in such a suit or that the Tribe would have refused to do so. This law suit is proof that the Tribe is willing to litigate the issue.

Thirdly, we believe this Court could entertain review by certiorari to the Crow Appellate Court, if National would have exhausted Tribal remedies. This is thus demonstrated. The Appellate power of this Court under Art. III of the Constitution extends to "all cases." *Martin* v. *Hunters Leesee*, Wheat. 304,338 (1816). "It is the case, then, and not the court, that gives the jurisdiction." *Ibid.* This appellate power is, furthermore, derived from the Constitution itself, not from Congress. ***Ex. parte***, *McKardle*, 7 Wall. 506, 512 (1869). Even in the absence of Congressional regulation, this Court could, under proper circumstances, exercise the appellate power, because Congress cannot negate the essential functions of this Court. Ratner, *Congressional Power Over the Appellate*

Jurisdiction of the Supreme Court, 109 Y. Pa. L.Rev. 157, 202 (1960). We believe considerations of Indian sovereignty, self-government, comity, appellate procedure, the need to avoid the harsh remedy of injunction, and the need to avoid clashes between competing courts, call for federal review under this Court's appellate power, if no other avenue is available. But, to justify federal review by the District Court under § 1331 because National has "no other federal remedy of any kind.", quite frankly, is a hasty conclusion, void of full consideration of the genuine interests of Not Afraid, and proper respect for the Crow Tribal Court. Tribal courts, at the very least, deserve more equality and respect as judicial tribunals. We do not believe tribal courts are the first and last arbiters of their own jurisdiction, but we do believe they are the first arbiters, and injunction by a district court is not the proper procedure to follow to provide access to the last arbiter -- this Court. We respectfully believe, § 1331 was, by its application against the respondents, wrongfully used to humiliate, embarrass, and shackle them, for over two years. As set forth elsewhere herein, we do not believe Congress intended § 1331 to be so construed and abused; we trust this Court will not allow such abuse, but will join the Court of Appeals on holding that National's complaint failed to state a claim for federal relief.

In summary, we simply argue that the general grant of federal jurisdiction under § 1331, read in the light of the more specific Congressional intent to foster tribal self-government, and to forbid federal court intrusion into tribal affairs, indicate that National's complaint to plead a federal claim.

2. The District Court As An Appellate Court.

Second, the District Court is not an appellate court. *Rooker* v. *Fidelity Trust Company*, 263 U.S. 413 (1922). It has no jurisdiction to directly review a state court judgement. *Atlantic Coast Line Railroad Co.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, 296 (1970). Such an action is a collateral attack upon the state judgement; the proper method for review is appeal within the state system; lower federal courts are not superior to state courts. *Lion Bonding & Surity Co.* v. *Karatz*, 262 U.S. 77 (1923). Even if the state court acts without jurisdiction, its ruling is not a proper subject for collateral attack by the District Court. *Carl Laemmle Music Co.* v. *Stern*, (DC-NY), 209 Fed. 129. Nlf'd 219 Fed. 534 (1913). The proper remedy is by appeal within the state court system. *Moore* v. *Pate*, 29 F.2d. 616 (1933).

We believe Congress intended that the District Court similarly refrain from acting as an appellate court over Tribal Courts, thus allowing the appellate process within the tribal court system to perform its mandated function. Our belief is based upon the following reasons.

As stated above, Congressional policy is to strengthen tribal self-government. Within the limited scope of tribal court jurisdiction over non-Indians, the judgments of these courts are entitled to full faith and credit in other courts. *Santa Clara Pueblo*, *supra*, at 65, fn 21. Congress has thereby evidenced its intent that the Tribal Court system be allowed to function through their various trial and appellate levels (as is the case with state systems) before federal questions arising therein are ripe for federal review.

If § 1331 is interpreted to afford National a federal remedy by its amended complaint, the District Court becomes, in effect, an appellate court to the tribal court.

There is no specific Congressional grant of such jurisdiction. We believe no other grant of appellate power has ever been given the District Court. We doubt Congress would impliedly, rather than expressly, grant such a radical enlargement of power. To imply such a grant of power would ignore the Congressional policy of fostering Indian self-government and that of preventing interference by federal courts with the orderly process of other court systems within the union.

3. Injunctions

Thirdly, the remedy afforded by the District Court injunction is itself a violation of Congressional policy.

28 U.S.C. § 2283 denies the power to the District Court to issue an injunction staying state court proceedings except as expressly authorized by Congress or where necessary to aid federal jurisdiction. We believe this statute is rooted in the need for mutual respect among coexisting sovereigns. Like State courts, tribal courts, regardless of how limited the scope of their powers, act with that same power of sovereignty. *Santa Clara Pueblo*, *supra*, p. 63, *Marrion* v. *Jicarrila Apache Tribe*, 455 U.S. 130 at 140 (1982), *Worchester* v. *Georgia*, 6 Pet. 515, 557. *United States* v. *Wheeler*, 435 U.S. 313 at 328 (1978). Therefore, they are entitled to the same protection from federal court intrusion as are the courts of the various states.

Comity alone calls for such a rule, but, this Court has gone further. In *Moran* v. *Sturges*, 154 U.S. 256, 14 S.Ct. 1019 at 1022 (1923), it said, "these rules have their foundation, not merely in comity, but on necessity; for if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one if they dare to proceed in the other.

Neither can take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice."[4] The injunction issued by the District Court "outlawed" the orderly functions of both the tribal levels and the appellate levels of the Crow Tribal Court system. It did more than afford National a federal remedy. It gave National the federally backed assurance that it need not appear in tribal court forums *ever, even to contest tribal jurisdiction*. As pointed out in footnote 4, the impropriety of the federal injunction is evident by considering the possibility that the Tribal Court could have also issued an injunction against National from proceeding in federal court. Then an impasse would have been reached. Until the jurisdiction question is finally resolved, injunction is not proper. We submit that Congress never intended such a construction of § 1331.

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[4] This very embarrassing conflict has occurred in this case. As petitioner points out on page 6 of their brief, Judge Battin has ordered return of property executed upon by order of the Crow Tribal Court. The Tribal Court, after proper notice, hearing, and deliberation, ordered the property returned only if National posted a bond. The petitioners responded to that Tribal Court order by citing Respondents for Contempt of Judge Battin's Order for failing to unconditionally ask the Tribal Court to order the return of the property. These Contempt charges are pending as we write this brief. We, Not Afraid and her attorney, are "damned if we do and damned if we don't." We cannot be true to our convictions that the Tribal Court has jurisdiction over this matter and at the same time obey Judge Battin's order. We believe all parties have a duty, in the first instance, without interference from the District Court, to follow the orderly process of the Tribal Court system; as stated before, National has orderly remedies it could pursue. It refuses to do so.

4. Federal Indian Law

Practically the whole field of Indian law is Federal law. It is rooted in treaties. All of Title 25, U.S.C. is a compilation of Congressional law pertaining to Indians. In light of these facts we note that § 1331 gives district courts jurisdiction over all civil actions raising federal questions involving the requisite dollar amount. It generally defines district court jurisdiction. If National's interpretation of § 1331 is adopted, every action commencing in a tribal court raising the requisite federal question will be subject to federal injunction which, in effect, will remove the case to federal court. We submit that such an interpretation of a general definition of district court jurisdiction must yield to the specific intent of Congress to foster Indian self-government and to avoid federal court interference with tribal courts. If application of § 1331 is not so limited, Indian self-government will have very little, if any, meaning.

5. Exhaustion of Tribal Remedies.

Fifthly, and most importantly, it follows from the preceding arguments that Congress, no matter what it intended by enacting § 1331, no matter how restrictive it might view the scope of tribal civil power over non-Indians, and no matter how liberal it might be in its intent to grant federal review of tribal court assertions of power, it did intend that tribal courts be allowed to exist and function. This being the case, surely Congress also intended that National should exhaust its tribal remedies before seeking the harsh remedy of injunction. No one has suggested any policy or reason for the contrary. Both the court of appeals majority and dissenting opinion condemned National's disrespct for the Tribal Court. *National Farmers Union, supra*, at 1324, 1326. In spite of all this, and the passage of over two years, National still

refuses to exhaust its tribal remedies. We believe neither Congress, nor this Court, intended to sanction or allow such disrespect to merit District Court jurisdiction or relief.

B. Federal Common-Law.

The Court of Appeals also correctly grounded its ruling upon the principal that judicial recognition of a cause of action arising under federal common-law is an unusual course, to be approached cautiously. *Milwaukee* v. *Illinois*, 451 U.S. 304, 312-14 (1981). This observation was rightly coupled with the manifested Congressional intent set forth above to justify limiting § 1331 jurisdiction.

II. CONGRESS INTENDED THAT THE CROW TRIBAL COURT SHOULD HAVE JURISDICTION OVER TORT CLAIMS BY A TRIBAL MEMBER AGAINST A NON-MEMBER.

A. Introduction.

In this section we will trace the seat of Crow Tort Jurisdiction[5] from the times before the Crows first encountered the "white man" until the present. We will show that this power never left this people. They did not bargain it away by treaties; Congress, with its plenary power, did not unilaterally take it away. The State of Montana has no power to take it away. We will also speak about the power of exclusion at the same time because we believe that, like the power to tax non-Indians on the reservation, the Crow Tort Jurisdiction has, for its source

[5] We will give this term definite meaning. It means the subject matter jurisdiction or power to try a case involving a tort committed inside Crow Territory by a non-Indian against a Crow. It is the first power described below.

of power, not only sovereignty, but the power of exclusion. *Marrion* v. *Jicarrila Apache Tribe*, *supra*.

B. Pre-treaty Crow Tort Jurisdiction.

"The Crow Indians originated in Canada, but some three centuries ago they migrated to what is now Southern Montana." *Montana* v. *United States*, 450 U.S. 544, at 547 (1981). We submit it is an undisputed fact that prior to contact with non-Indians the Crows held both tort jurisdiction over non-Indians and the power to exclude non-members.

A simple reflection upon popular notions of conditions at that time proves that the Crows then held these powers. Any person who ventured into Crow Territory[6] and who "injured" a Crow in the least could expect swift "assumption of civil jurisdiction" over the "subject matter and parties" followed immediately thereafter by "judgment and recompense" by way of a scalping and usually death. Crude as it may seem, it evidences to the legal mind in unmistakable terms that prior to 1825 the Crow "Nation" held, and exercised, civil jurisdiction over torts of non-Indians committed against Crows within Crow Territory. The second power was also evident from the fact that the death penalty is the ultimate act of exclusion of a person from a territory.

C. The Treaty Of 1825.

This was the state of affairs when sixteen Crow Chiefs and Warriors "smoked the pipe of peace" with agents of

[6] This term means all ground within the limits of their claims to sovereignty. At most times, and in most contexts, it means land with the exterior boundaries of the Crow Indian Reservation. But, in early times, it was the land they were fighting to protect as their own.

the United States at the "Mandan Village," August 4, 1825. 7 Stat. 266. By this treaty, the Crows pledged friendship and asked for the *protection* of the United States from their enemies, one of which was becoming the non-Indians. The United States agreed to receive the Crows "into their friendship and unto their protection." *Ibid*, Art. 2.

One cannot read Articles 3, 4, and 5 of the treaty without recognization of the power retained by the Crows to exclude non-Indians from Crow Territory, the only exceptions being persons authorized by the United States and the Crows to pass through the territory and trade with the Crows. Thus, we conclude that the power of exclusion remained with the Indians under the treaty.

The only mention of torts of non-Indians against Crows is as follows:

> "And the United States hereby guaranty to any Indian or Indians of said tribe, a full indemnification for any horses or other property which may be stolen from them by any of their citizens: Provided, that the property stolen cannot be recovered, and that sufficient proof is produced that it was actually stolen by a citizen of the United States." *Ibid*, Art. 5.

It seems clear that this provision only promised compensation for torts of a non-Indian, a guarantee of compensation by the federal government. It says nothing about subject matter jurisdiction over a tort. Certainly no cessation of pre-1825 Crow Tort Jurisdiction could be implied from this treaty.

D. The Treaty Of 1851.

The parties next entered a treaty at Ft. Laramie on September 17, 1851. 11 Stat. 749. This treaty defined generally "the territory of the Crow Nation" spelling out

permission granted to the United States to "establish roads, military and other posts, within their [Nation]." *Ibid*. Art. 2. Thus, Crow sovereignty over territory was re-affirmed as well as recognition of the power to exclude all but those allowed by treaty with the United States.

Article 7 states that, "In consideration of the treaty stipulations, and for the damages which have or may occur by reason thereof to the Indian Nations, parties hereto . . . the United States binds themselves to deliver to said Indian Nations the sum of fifty thousand dollars per annum for the term of ten years . . ." This provision in a record of the Crows acting as a sovereign nation which settled a "tort claim" against the citizens of another sovereign nation *by use of treaty*. Obviously, then, the Crows, by this treaty, retained their pre-1825 Crow Tort Jurisdiction. As an asside, we noted that the treaty is evidence that, at that early day, the Crows were learning the "white man's ways." Instead of their barbaric earlier method of "settling" a tort dispute, they settled this one as one nation by treaty with representatives of the nation of the tortfeasor. We mention this in defense of ourselves speaking as Crows. We show we are capable of fairly, intelligently and justly adjudicating this present dispute. We deserve the power we assert.

E. The Treaty Of 1868.

The second treaty of Fort Laramie was executed May 7, 1868. 15 Stat. 649. We note, in agreement with Amicus Washington, that the treaty clearly forbids non-Indians from the reservation created as did the previous treaties. Amicus Washington, Supra. p. 9, (15 Stat. 649, Art. 2). We disagree with Amicus Washington as to the impact of Article 1 on Crow Tort Jurisdiction. In the first place, while criminal jurisdiction is clearly placed with the United States for punishment of non-Indian crimes, *(Oli-*

phant v. *Suquamish Indian Tribe*, 435 U.S. 191). The only statement as to civil jurisdiction is that the United States will "also re-imburse the injured person for the loss sustained." Amicus Washington suggests this clause should be coupled with the preceding clause about criminal punishment to exclude both criminal and civil jurisdiction over non-Indians committing wrongs against Indians. To so conclude ignores some important considerations.

First, it must be remembered that both the tenor and specific provisions of the treaties of 1825 and 1851, preceding this one, placed the United States in the place of "guaranty" and "indemnification" for non-Indian wrongs, but no cede of Crow Tort Jurisdiction was made. The well known principles favoring construction of these treaties in a light most favorable to the Indians dictates that the provisions "to re-imburse the injured person for the loss sustained" be construed consistent with the continuation of the warranty commitment rather than a relinquishment of previously existing Crow Tort Jurisdiction. This is especially true if the meaning of the article appears on its face to be unclear, and we submit that at its best, its meaning is unclear.

Second, the suggested interpretation makes its construction of Article 1 in complete disregard of *Williams* v. *Lee*, 358 U.S. 217 (1959). It contends Article 1 answers the question of Crow Tort Jurisdiction when non-Indians come into the reservation by denying the power. But *Williams* was a case where the non-Indian did come in, and the court did uphold Indian tort jurisdiction, and, *Williams* considered the 1868 treaty with the Navajos (15 Stat. 667) a treaty identical to the Crow Treaty for these purposes.

Thirdly, Amicus Washington's construction of Art. 1 also flies in the face of many other decisions of this Court finding that at least some civil jurisdiction over non-Indians existed historically and to this present day. *Merrion* v. *Jicarrila Apache Tribe*, 455 U.S. 130 (1982), *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978). *United States* v. *Mazurie*, 419 U.S. 544 (1975). Yet this Amicus argues Art. 1 denies *all* such civil jurisdiction. This cannot be.

Fourthly, the "warranty" construction we place upon Article 1 is also consistent with the general role of guardian the federal government has assumed on behalf of the Indian generally and the Crows specifically. See *McClanahan* v. *State Tax Commission of Arizona*, 411 U.S. 164, 175, interpreting the similar 1868 Navajos treaty to "establish the lands within the exclusive sovereignty of the Navajos under general federal supervision." The government committed by these early treaties to act as a "protector" of these persons, handicapped by their language, education, and traditions from dealing with the "civilized western man." This is not to say that such assumption of guardianship was a relinquishment of civil power from the Crows to the federal government. It merely provided trustee assistance in the discharge of this power while the Crows were disadvantaged. As we shall see, the guardian relationship of the federal government has lessened over the years as the Crows have "matured" in their ability to exercise their power in the "white man's world," but they have never relinquished this civil jurisdiction. As will be shown hereafter, Congress has consistently protected it and lately fostered its full exercise by the Crows. We again emphasize that Art. 2 of this treaty reaffirms that the seat of power of Crow Tort Jurisdiction continued to reside with the Crows. Further evidence of this fact, and especially of intent to

eventually allow full exercise of it by the "ward," is the fact that Art. 7 establishes schools for the Indians. This is the beginning of attempts to remove the impediment that existed to self-government in a white man's world—ignorance.

F. The Non-Indian Comes Into The Reservation, "Cattle Barons."

This is where we feel compelled to expand the historical account pertinent to this case. We will consider from the published works, and public records,[7] the events which disclose how the non-Indians got onto the reservation in spite of the above referenced three treaties forbidding their presence without the consent of the Crows. We deem this appropriate as it will shed light upon the question of whether non-Indians entry and remainder was ever coupled with immunity from Crow Tort Jurisdiction. With this explanation of need, we proceed to examine their entry.

Non-Indians were forbidden from the reservation in very specific terms by the Treaty of 1868. As we have also established that only the Crows and the federal government could give permission for entry, other entries were trespasses.

We note that Art. 4, Treaty of 1868, carved out the first exception to the rule that the reservation was to be "set apart for the absolute and undisturbed use and occupation of the Indian." Namely, that the Indian agents would, "make said reservation their permanent home . . ."

Later, not only Indian agents but also traders, missionaries, and cattle ranchers came to stay. We will focus

[7] This Court may take judicial notice of "a part of the public history of the Country." *Clark* v. *United States*, 99 U.S. 493 (1879).

upon their coming to see if Congress, through treaty or law, immunized them from the retained Crow Tort Jurisdiction.

We will not specifically treat the agents, traders, and missionaries, but merely note in passing that they came to the reservation under express permission of the federal government and the Crow "Nation." None of their appointments, licenses, or grants of permission exempted them from Crow Tort Jurisdiction. We will specifically treat the advent of cattle ranchers in Crow Territory.

The bulk of the non-Indians coming to the reservation have, until the advent of recent coal development, been persons tied to cattle grazing "empires." As early as 1880 the way was paved for the grazing of the herds from Texas going to Montana to be grazed on the reservation. A treaty of May 14, 1880, never ratified, would with the consent of the Crows "permit cattle to be driven across the reservation or grazed on the same, the parties desiring to so drive or graze cattle." Kappler, *Laws and Treaties*, Vol. II p. 1063. This same provision was reaffirmed by the Act of April 11, 1882, 22 Stat. 42, which was ratified.

Apparently cattle had been trespassing onto the reservation around 1880, but leasing developed under the direction of the Indian department a little later. The practice expanded as time went on. Bradley, *After The Buffalo Days*, an account of the first years of reservation life for Crow Indians, based on official government documents from 1880 to 1904, Lodge Grass Mt: by Author, 1972, p. 108-119, 167-174; *Lookin' Back*, a history of Big Horn County, Big Horn County Historical Society, 1976, p. 315-316. "Cattle Barons" of Big Horn County, included the Antler Ranch, and the Spear Cattle Company.

Lookin' Back, *supra*. p. 235, 236. The granddaughter of Matt Tschergi, founder of the Antler Ranch, boasted of his exploits of Indian land as follows:

> "At one time, his grazing cost was so low that he could take on a partner's steers for 50 cents per head per month; provide all the range at 25 cents per head, the labor and paperwork; guarantee the return of the principal with 5 percent interest; throw in 2 percent loss clause and still have a good deal for himself, even if the steers just held the money together." *Lookin' Back*, *supra*, p. 257.

These non-Indian ranchers were making this money from Indian lands. They came to the reservation by lease agreement authorized by the leasing Acts of 1880 and 1882 above referenced. No cede of any jurisdiction or sovereignty was made by these Acts. These people came to the reservation with permission and grant for one purpose—to raise cattle. The Indians were facing starvation and poverty at the time, being forced to sell about 1/3 of their reservation to survive. See Act of April 11, 1882, *supra*, *After the Buffalo Days*, *supra*, p. 33.[8] But, they did not give up their claims to sovereignty over the lands that remained. The Congressional Acts confirm this fact by their silence.

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[8] We hesitate to speak further for fear that we will be interpreted as exaggerating the truth. But we must say, at the same time, Cattle Empires were being built while the Indians found it almost impossible to become "farmers" as the "Great White Father" asked. Instead, they faced starvation. *After the Buffalo Days*, Supra, p. 67. Can we ever say these people intended to relinquish their sovereignty? The correct statement seems to be that they might have been sorely tempted to do so by unbearable conditions, but they never voluntarily intended to do so. Their treaties and the Acts of Congress should not be so construed.

Congress did not change the leasing policy until May 25, 1926, 44 Stat. 568. Again, the act is silent as to civil jurisdiction over the non-Indian lessees. We again assume that Congress and the Crows intended no cessation of Crow Tort Jurisdiction.

G. The Organic Act Of 1864, Enabling Act, And Constitutions Of The State Of Montana.

In further support of the proposition that the Indians relinquished no tort jurisdiction to these non-Indians inhabiting the reservation, and that, non-Indians came into the reservation charged with knowledge that they were subjecting themselves to the Crows in a governmental or jurisdictional sense, we now review the Organic Act, Enabling Act, and two State Constitutions forming the foundations for the government the non-Indians, the State of Montana.

On May 26, 1864, 13 Stat. 85, *four years before the Crow Treaty of 1868*, Congress created the territorial government of Montana for the non-Indians of that territory as follows:

> "Be it enacted . . . That all that part of the territory of the United States included within the limits to-wit: [description of territory omitted] . . . be, and the same is hereby created into a temporary government by the name of the territory of Montana . . . Provided further, that nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory so long as such rights *remain unextinguished* by treaty between the United States and such Indians, or to include any territory, which by treaty with any Indian tribes, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and con-

> stitute no part of the territory of Montana, until said tribe shall signify their assent to the President of the United States to be included within said territory, or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights by treaty, law, or otherwise, which it would have been competent for the government to make if this act had never passed." (emphasis supplied)

We repeat for emphasis, this act preceded the 1868 Treaty of Laramie. When the non-Indians obtained their territorial government in 1864, pre-treaty Crow Tort Jurisdiction retained by the Treaty of 1825 and the 1851 Treaty, "remain unextinguished," as the Organic Act so clearly recognizes. To make this even more clear, the Organic Act states that Indian Territory, absent tribal consent, is not to be within "the territorial limits or jurisdiction of any state or territory, but all such territory shall be excepted out of the boundaries, and constitute no part of the territory of Montana, until said tribe shall signify assent to the President of the United States . . ."

And what was the governing Indian treaties as of 1864 with the Crows? A simple, straightforward promise in 1825 to exclude non-Indians and to protect the Indians and to "guaranty" and give "full indemnification" for the losses suffered at the hands of the United States citizens. Crow Treaty, 1825, *supra*, Art. 1-5. And, the 1851 Treaty merely continued that warranty that the "United States bind themselves to protect the aforesaid Indian Nation against commission of all depredations by the people of the said United States, after the ratification of this treaty." Treaty of 1851, *supra*, Art. 3. Again, as stated above, in 1851 the Crows were remedying tort claims as full sovereigns by treaty.

Crow Tort Jurisdiction could not possibly have been diminished by the Organic Act of 1864. The territory of

Montana, and its non-Indian citizens obtained their own territorial government on the express condition that Crow Tort Jurisdiction *remain unextinguished*, and that the Indian lands were not to be even a part of the Montana territory or jurisdiction at all. This could not be more clear.

What, then of the Enabling Act, Statehood, and the Montana Constitutions? The Enabling Act was approved February 22, 1889, 25 Stat. 676. It conditions statehood as follows:

> "That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all the lands lying within the limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, and the same shall be and remain subject to the disposition of the United States, and said Indian lands shall *remain* under the absolute jurisdiction and control of Congress of the United States . . ." (emphasis supplied)

We emphasize the word "remain." What is its antecedent? It is, and must be, the clear and complete disclaimer of the Organic Act of 1864 to both territory and jurisdiction of Indians, and thence back to the Treaties of 1851, 1825, and pre-treaty retained Crow Tort Jurisdiction. All of this is consistent with the fact that the non-Indians were at this time absolutely excluded from even being in Crow Country without specific permission. They could have no rights there, especially immunity from Crow Tort Jurisdiction. They entered entirely on whatever terms the Crows demanded. And, there is no evidence that the Crows ever relinquished their Tort Jurisdiction on any of the occasions that permission to enter the reservation was granted.

The Montana Constitution of 1889 shows that the non-Indians accepted these terms and restrictions demanded by the federal government. See Constitution of Montana, 1889, Ord. No. 1, wherein language identical to the Enabling Act is set forth including the word "remain." See, also, the Montana Constitution of 1972, Art. 1, compact with the United States, which also reaffirms the same conditions, including, again, the use of the word "remain."

H. The Organization of Lodge Grass School District No. 27.

With this background, we are ready to examine the organization of the Petitioner, Lodge Grass School District No. 27, a political subdivision of the State of Montana, to determine if Congress intended that it be subject to the Crow Tort Jurisdiction or, whether it should be afforded some type of immunity.

Lodge Grass School was organized by order of the County Superintendent of Schools of Rosebud County, Montana, February 28, 1911. See document No. 184, Order of the Superintendent of Schools, Rosebud County, on file in the office of the County Superintendent of Schools of Rosebud County, Montana, at Forsyth, Montana. The first trustees were a local rancher, minister, and merchant.[9] No Indian was allowed in this school from

[9] They were: A. M. Stevenson, General Store Owner, and licensed Indian Trader, who came to Lodge Grass in 1902. *Lookin' Back*, *supra*, p. 10-11; W. A. Petzoldt, a minister and missionary who, with the consent of the federal government and the Crows, December 1, 1903, established a mission and Indian School at Lodge Grass. The Indians were not allowed in the Lodge Grass School until 1920 with the passage of the Allotment Act of that year, *Lookin' Back*, *Supra*. p. 183, 184; the third trustee O. P. McKinley, was a cattle rancher, *Lookin' Back*, *supra*, p. 243.

1911 to 1920, when the Allotment Act of that year was passed by Congress. *Lookin' Back*, *supra.*, p. 183, 184. Crow Allotment Act of 1920, 41 Stat. 751.

The Lodge Grass School now sits on 5 acres of land deeded to the trustees of said school and purchased by them for $750.00 on June 24, 1918. See Instrument No. 12496, recorded in the Office of The Clerk and Recorder of Big Horn County, Montana, December 23, 1918. This land was part of a patent issued January 11, 1911. See footnote 1 above. Neither of these instruments make any mention of Indians, or Indian powers whatsoever. No cede of Crow Tort Jurisdiction can be claimed from the grants.

We now have the establishment of the Lodge Grass School in its historical setting to determine if Congress, at the time of the inception of the school, afforded it any immunity from Crow Tort Jurisdiction. We find none as will be shown.

First, as shown above, Crow Tort Jurisdiction, remained with the Crows from pre-treaty times, through the treaties of 1825, 1851 and 1868. It especially *remained* in spite of the Organic Act of 1864, the Enabling Act of 1889, and the Montana Constitution of 1889, all of which ceded power to the non-Indians of Montana, but which also specifically excluded from that grant of power any power over the Crows of their territory, and furthermore, failed to give any immunity from Crow Tort Jurisdiction for any non-Indian going into Crow Territory.

Second, we address the effect of the 1887 Allotment Act and answer Amicus Washington's claim that the Lodge Grass School property as fee patented land lost its status as Indian Land.

Amicus Washington contends that alienation of this land to non-Indians somehow defeated the Crow Tort Jurisdiction. *Amicus Washington, supra.* p. 10-11, citing as authority, *Montana, supra.*, at 559.

This language of *Montana* that "It defies common sense to suppose the Congress would intend that non-Indians purchasing allotted lands would become subjected to tribal jurisdiction," must be understood in its context. This was a footnote to what we perceive was the principle holding of *Montana,* that tribal sovereignty is not diminished by allowing the State to regulate activity like fishing, when that regulation does not infringe upon the exercise of tribal sovereignty. The complete meaning of the footnote, as pertinent here, seems to be then, that non-Indian fee owners are not automatically and totally subjected to tribal jurisdiction just because they own land inside the reservation and especially when they have done nothing which affects the tribe or its members. But, this does not speak to the case here where, obviously, the conduct of the school was found by the Crow Tribal Court to have caused injuries to a Crow Indian.

We see no other way to read this footnote, if we are at the same time to give meaning to the court's later acknowledgement that Crow Tort Jurisdiction does still exist on the reservation over non-Indians on fee lands. *Montana, supra.* at 565, 566.

Furthermore, this "checkerboard jurisdiction" claim made by Amicus Washington, was clearly rejected by this Court. See *Moe* v. *Confederated Salish Kootenai Tribes,* 425 U.S. 463, at 478 (1976) where Mr. Justice Rehnquist, speaking for the Court said, "If the General Allotment Act, itself, establishes Montana's jurisdiction as to those Indians living on "fee patented" lands, then for all jurisdiction purposes—civil and criminal—the Flathead Reservation has been substantially diminished in size . . .

we conclude that "[s]uch an impractical pattern of 'checkerboard jurisdiction' *Ibid.* was contrary to the intent embodied in the existing federal statuary law of Indian Jurisdiction." *Ibid,* p. 478.

Finally, we answer the statements of Lodge Grass School in its brief at page 20. As is now evident, the school pre-dated the Allotment Act of 1920 by 9 years. We have great difficulty with the school's statement that, "it exists because Congress, in the Crow Allotment Act of 1920, § 16, *supra, required* the State of Montana to own land on the reservation provided it was used for public education and *mandated,* that Montana thereby provide Indian children equal educational opportunities on the Crow Reservation." (emphasis supplied) Pet. Brief at 20. We find no other way to treat this statement with due respect, but to say that it simply is not true either in the whole or in its parts. How can the school exist for 9 years prior to 1920, serve only non-Indians, and then exist *because* Congress required it to serve Indian children? Furthermore, a simple reading of the cited § 16 of the Act shows that Montana was not "*required*" to afford Indian children equal education. The grant was *conditionally* made, the condition being that, *if* the State would provide equal education for Indian children, it would receive the school sections of land. Had Montana chosen not to assume this obligation it could have done so, and thereby, it would not have received the lands.

Petitioner's defense that the school is not a profiteer,[10] while technically correct, also misrepresents the truth.

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[10] We disagree with Petitioner that the Lodge Grass School, at its inception, did not represent 'profiteers.' The minority report of the House Indians Affairs Committee in 1880 reviewing a proposed allotment bill said:

> "The real aim of this bill is to get at the lands and open them up for settlement. The provisions for the apparent benefit of the

After all, what is the State of Montana and its political subdivision, Lodge Grass School District No. 27? In 1911, when the school was organized, it was an educational subdivision, organized principally for children of the ran-

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Indian are but the pretext to get at his lands and occupy them . . . If this were done in the name of greed, it would be bad enough; but to do it in the name of humanity, and under the cloak of an adurent desire to promote the Indian welfare by making him like ourselves whether he will or not, is infinitely worse . . ." Getches, *Cases and Materials on Federal Indian Law*, p. 71 (1979).

Robert Yellowtail, first Indian to be a superintendent of an Indian Reservation, 1933-1945, who still lives and is over 90 years of age speaks of the General Allotment Act and the "Cattle Barons" as follows:

"At about this time the Texas cattle herd drives were in full swing to the Montana ranges. Nelson Story, who was a local cattle raiser, initiated grazing the Crow Reservation ranges and employing Crow Indian cowboys as employees and breaking horses for his cattle horse-working herds. Other cattlemen with herds from the Texas drives, such as the 04, UT, FUF and other cattle outfits, were all busy getting grazing leases for 3 cents per acre on the lush ranges of the Crow Reservation. Today, these same ranges are bringing $2.00 and more per acre. The Crow grazing ranges have yielded many rich cattle owners and yet the Crow people are languishing in economic want and misery because they hadn't the money with which to graze their own cattle on their ranges and become rich as have the white cattle raisers who have been using their grass to enrich themselves. That process is still going on. All of the Indians' economic woes were created by this deceptive and conniving bill sponsored by the Government to get the Indians' lands.

"The General Allotment Act of 1887, known as the Dawes Act, was an Act of Congress to speed up the sale of Indian land to the whites. The Indians under this Act, were allotted 160 acres to the heads of families and 80 acres to others then, thereafter, the lands left after the allotments were declared surplus and sold to the whites. In this manner vast areas of Indian lands were transferred to the whites and soon thereafter the Indians became a landless horde seeking Government aid to survive. Thus began the Indian problem of today which the Government itself created. All of the Indians' economic woes were created by this wicked, deceptive and conniving Bill sponsored by the Government to get the Indians' lands." *Lookin' Back, supra.*, p. 316.

chers making a living, and even fortunes, from Indian lands. *Lookin' Back, supra*, p. 257. As already pointed out, this school was the school of these ranchers and their attending merchants. They organized under the state laws, but they were guests and "profiteers" on the reservation with the permission of the Crows. They were richly blessed from the Crow lands, true by the sweat of their own brows, but as a jurisdictional matter, they came looking for their fortune on Indian terms, not State of Montana terms.

Most importantly, where is the indication of Congress in 1911, when the school was organized, that Congress, with its plenary power over the Indians, intended the school to be immune from the Crow Tort Jurisdiction? We have reviewed the treaties and laws and find none.

I. The Indian Reorganization Act of 1934.

To Amicus Washington's claim that the Indian Reorganization Act of 1934, (48 Stat. 984, 25 U.S.C. § 461 *et. seq.*), continued a prior policy of denying civil jurisdiction to Indian tribes, we make statements proving the contrary.

First, as has been shown above, the continuing policy of Congress was not one of denial, but of recognition of Crow Tort Jurisdiction. The aborted policy of assimilation never achieved its ultimate objective. It was abandoned before the final step was reached—termination of the reservation and the attendant Crow Tort Jurisdiction.

Second, while one reading of the hearings and debates quoted by Amicus might indicate no intent to grant extensive Tribal Court power, this does not mean that the sovereign Crow Tort Jurisdiction did not lodge with the Crows. It *remained*. At worst, it was being held

temporarily in trust for the Crows by the federal government—its guardian.

Third, the Crow Tribe has never brought itself within the strictures of the Indian Reorganization Act. Like the Navajos, they never incorporated under that Act. Their powers remained as recognized by the proceeding laws and treaties set forth above.

From the foregoing, we see no loss of the Crow Tort Jurisdiction by the passage of the Indian Reorganization Act. We see only an end to the potentially destructive effect of the different allotment acts that potentially could have, but did not, destroy this power.

J. Modern Congressional Intent.

Any examination of history to find Congressional intent as to Crow Tort Jurisdiction should not end with the Indian Reorganization Act. Much has been said since.

We will forego elaborate treatment of this subject, and only say that there is a number of significant acts which evidence Congressional intent to encourage, implement and strengthen Indian Self-Government. See the Indian Financing Act of 1974, 25 U.S.C. § 1451, *et. seq.*; the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 *et. seq.*; the Indian Self-Determination Act of 1975, 25 U.S.C. § 450, *et. seq.*

Most significant in this area is the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302 *et. seq.* § 1322 allows a state like Montana to exercise jurisdiction over a civil case (like torts) "between Indians or to which Indians are parties which arise in the areas of Indian Country . . ." only with the consent of the tribe. The Crow Tribe has given no consent. There can be no such state tort jurisdiction by Montana. *Kennerly* v. *District Court*, 400 U.S. 423

(1971). See also *State ex rel Flammand* v. *Flammand*, ____ Mont ____, 621 P.2d 471 (1980) where the Montana Supreme Court refused to exercise civil jurisdiction, noting non-compliance with 25 U.S.C. 1321-1326, of a civil action by a non-Indian against an Indian arising on an Indian Reservation. In spite of this obvious barrier, National insists that we take our claim to state court. *Pet. Brief, supra.* p. 22. It gives no authority for its belief. We believe that to do so would not only violate the ICRA specifically, but it would infringe upon inherent Indian tribal jurisdiction and the recognized Congressional policy of fostering Indian self-government as evidenced by the ICRA and other modern legislation.

In summary, we believe the Crow Tribe retains Crow Tort Jurisdiction. Our review of history reveals that Congress, with it's plenary power to diminish this power, has not done so. It has even acted positively in discharge of its guardianship duty to the Crows to foster and encourage exercise of this power.

III. THE EXECUTIVE BRANCH HAS ACTED CONSISTENT WITH THE INTENT OF CONGRESS.

We now consider the acts of the Executive Branch of the United States to determine if its acts have been consistent with our view of Congressional intent.

Before doing that, we again point out a matter of some confusion. Since the treaty of 1825, the President and his branch of this government have acted as "protectors" or guardians of the Crows. The treaties and laws recognize duties owned by the United States to the Crows, but they do not cede Crow Tort Jurisdiction powers to the federal government or the States.

The Executive Branch has consistently recognized the power of Indian Tribes to subject non-tribal members to

tribal civil jurisdiction. See F. Cohen, *Handbook of Federal Indian Law*, 253 (1982 Ed.). See, also, 23 *Op. Atty Gen.* 214 (1900) and 17 *Op. Atty Gen* 134 (1881). Two opinions rendered by the Solicitor of the Department of the Interior support tribal civil jurisdiction over non-Indians. In a comprehensive opinion rendered in 1914, the Solicitor concluded:

> ". . . over all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business." 55 Ind. Dec. 14, 50 (1934)

The power referred to by the solicitor applies regardless of the status of the land involved which is the status of the liability producing act.

> ". . . even if the Indian title to particular lots sold had been extinguished . . . the result is still the same, for the legal right to purchase land within an Indian reservation gives to the purchaser no right of exemption from the laws of such nation." 23 *Op. Atty Gen* 214, 217 (1900). See also *Buster* v. *Wright*, 135 F 947 (8th Cir. 1905).

Each of the above cited authorities was cited with approval by the Supreme Court in *Washington* v. *Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 98 S.Ct. 2069, 281 65 L.Ed.2d. 10 (1980). Therefore, the validity of the principles expressed still remains.

The most recent example of the Executive Branch acting upon the assumption that tribes possess civil authority over non-Indians occurred in 1976. The Solicitor of the Department of Interior affirmed tribal civil authority over non-Indians in both the regulatory and adjudicatory areas in an opinion received October 13, 1976. See *Op. Sol. Int.*, Oct. 13, 1976.

The final point to be made is that in addition to acting on a belief that tribes have such jurisdiction, the Executive Branch has a recognized general interest of encouraging tribal sovereignty and independence. See *Morton* v. *Mancari*, 417 U.S. 535, 555. 94 S.Ct. 2474, 2485, 41 L.Ed.2d. 290 (1974).

IV. THE JUDICIAL BRANCH HAS CORRECTLY INTERPRETED THE INTENT OF CONGRESS.

A. Introduction.

The judicial branch of the federal government has upheld tribal jurisdiction over non-members in a variety of instances. Justice Marshall, writing for the Supreme Court in *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, (1978) stated:

> "Tribal Courts have repeated been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Martinez*, 435 U.S. at 65.

The basis of such decisions lies in the recognition of the fact that Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territories . . ." See *United States* v. *Mazurie*, 419 U.S. 544, 557, (1975). As recently as 1981 the Supreme Court upheld tribal jurisdiction in this area.

> "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe." [Citations omitted] See *Montana* v. *United States*, 450 U.S. 544, (1981).

The District Court relied upon the interpretation of the above quoted portion of *Montana* found in *Swift Trans-*

portation, Inc. v. *John*, 546 F. Supp. 1185, (D.Ariz., 1982) to conclude that the facts of the instant case do not support the assertion of tribal jurisdiction. Not Afraid asserts that *Montana*, upon analysis of the applicable statutes and case law, and specifically against the backdrop of tribal sovereignty. [See *McClanahan* v. *State Tax Commission of Arizona*, 411 U.S. 164, 172, (1973)] does not require that conclusion.

B. The Limitation To Tribal Entities.

The District Court memorandum opinion relies heavily upon that portion of *Swift* which limits the tribe's jurisdiction over non-Indian conduct to activities which threaten the tribe as a collective entity. See *District Court Memorandum Opinion*, Pet. App. at 22a-24a. *Swift* involved the tortious conduct of a non-Indian on land within a reservation. The *Swift* court, upon consideration of that portion of *Montana* which upholds tribal jurisdiction over conduct which "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare *of the tribe*," (emphasis added), reached the following conclusion:

> "The court of course understands that an automobile accident can have a 'direct effect on . . . the economic security, or the health or welfare of the individual involved.' Under this second portion of the test, however, the focus is on the interests of the tribe rather than the interests of the individual members of the tribe." *Swift*, 546 F. Supp. at 1193.

This conclusion is clearly erroneous upon consideration of *McClanahan, supra*. *McClanahan* involved the attempt by the State of Arizona to impose its personal income tax on a reservation Indian whose income was derived solely from reservation sources. The Arizona

Court of Appeals, in upholding the challenged application of the tax, held that the issue:

> ". . . is not whether the Arizona state income tax infringes on plaintiff's rights as an individual Navajo Indian, but whether such a tax infringes on the rights of the Navajo tribe to be self-governing." *McClanahan* v. *State Tax Commission*, 14 Ariz. App 452, 454, 434, P2d. 221, 223. (1970)

Similarity of the emphasis of the tribal entity rather than the individual tribal member in *McClanahan* as in *Swift* is clear. In striking down the tax, the Supreme Court in *McClanahan* rejected the emphasis on tribal as opposed to individual rights.

> "Finally, we cannot accept the notion that it is irrelevant 'whether the . . . state income tax infringes on [appellant's] rights as an individual Indian, as the State Court of Appeals maintained. [citations omitted] To be sure, when Congress has legislated on Indian matters, it has, most often, dealt with the tribes as collective entities. But those entities are, after all, composed of individual Indians, and the legislation confers individual rights. This Court has therefore held that 'the question has always been whether the state action infringed on the right of *reservation Indians* to make their own laws and be ruled by them.' *Williams* v. *Lee*, *supra*, at 220 of 358 of U.S., at 271 of 79 S.Ct. (emphasis added) In this case, appellant's rights as a reservation Indian were violated when the state collected a tax from her which it had no jurisdiction to impose." *McClanahan*, 411 U.S. at 181.

The interpretation of *Montana* found in *Swift* cannot stand in light of *McClanahan*, a case which has never been overruled.

That portion of *Montana* which contains the phrase ". . . threatens or has some direct effect on the political integrity, the economic security, or the health or welfare

of the tribe." *Montana*, 101 S.Ct. at 1258, (emphasis added), cannot be given the interpretation used in *Swift* for the reason that it is followed by a citation to *Williams* v. *Lee*, 358 U.S. 217, (1959). *Williams* stands for the proposition that a tribal court has exclusive jurisdiction to hear the contractual claim of a non-Indian plaintiff against an Indian Defendant. The Court based its decision on the sovereign right of reservation Indians to make their own laws and to be governed by those laws. The instant case is distinguishable in that it involves an Indian plaintiff and a non-Indian defendant. The irrelevance of a distinction based on a reversal of roles has been recognized by the Honorable Judge William C. Canby, Jr., writing in *American Indian Law*, Judge Canby stated:

> "Strong policies also support the view that tribes may exercise jurisdiction in the *William* v. *Lee*, situation if it is reversed—that is, if the Indian originally sues the non-Indian. The subject matter of the transgression that occurred in Indian Country is exactly the same, and concerns tribal self-government just as much, when the Indian sues the non-Indian as when the reverse occurs . . . moreover, the Supreme Court has recently acknowledged that the tribe has inherent civil authority, even on non-Indian reservation lands, over actions of non-Indians that affect Indian interests such as 'the political integrity, the economic security, or the health or welfare of the tribe' *Montana* v. *United States*, 450 U.S. 544 (1981).
>
> "The tribal interest is clear when an Indian sues a non-Indian for a claim arising in Indian country; as already discussed, this is simply *Williams* v. *Lee* except that the Indian rather than the non-Indian chooses to bring the suit." Canby, *American Indian Law*, pp. 142-145 (1981).

Judge Canby's position was apparently approved by this Court in *Williams* itself when it said:

> "It is immaterial that respondent is not an Indian, He was on the Reservation and the transaction with an Indian took place there." 358 U.S. at 223.

C. Interest Analysis

Assuming, for the purposes of argument, that *Swift's* conclusion that non-consensual non-Indian conduct must affect a tribal interest for tribal jurisdiction to arise, it does not follow that no sufficient tribal interests exists in the instant case. The Crow Tribe has several interests involved when a member is injured by the tortious conduct of a non-Indian.

1. The Obligation To Provide A Forum.

The most basic interest concerns the obligation of the tribe, as a responsible governmental entity, to provide a forum for the peaceful resolution of disputes involving members of the reservation community. This type of interest prompted Congress to enact the so-called "Public Law 280."

Providing a forum for the peaceful resolution of disputes fulfills three tribal interests. It provides an alternative to self-help vindication of rights. The public vindication of private rights through public institutions tends to deter future violations. Most importantly, the resolution of disputes through public court room tends to foster public confidence in government. The alternative is self-help and the resulting anarchy that vigilante-ism brings.

Chief Judge Muecke recognized these interests when he wrote:

> ". . . it is also apparent that unlawful repossession threatens or has some effect on the political in-

tegrity, the economic security, or the health or welfare of the tribe. [citations omitted] The tribe has a real interest in discouraging self-help repossessions. Not only does [the tribal repossession statute] reduce the possibility that Indians will be wrongfully deprived of their property, it was enacted for the express purpose of preventing 'breach of the peace'." *Babbitt Ford*, 519 F. Supp. at 431.

2. Protection Of Tribal Interests.

The Tribe clearly has an interest in ensuring that injured tribal members obtain compensation from a tortfeasor. The alternative is for the tribe to provide social services to the victim during the pendancy of his recovery. The effect of denying tribal members a right to obtain a tribal remedy would have two effects. "Not only would it undermine the authority of tribal forums . . . but it would also impose serious financial burdens on already 'financially disadvantaged' tribes." *Martinez*, *supra*, 436 U.S. at 64.

Fisher v. *District Court*, 424 U.S. 382, 386 (1976), citing *Kennerly* v. *District Court*, 400 U.S. 423, 426-429 (1971) expressed great reluctance to subject "a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves." The present controversy does involve Indians; it does involve conduct of a non-Indian on the reservation. These facts call for the tribal forum to adjudicate this controversy.

3. Conformity To Tribal Standards Of Conduct.

The power of an Indian tribe to regulate the conduct of non-Indians and enforce tribal standards of behavior as an adjunct of the tribe's responsibility for the health and welfare of its members has been recognized. See *Marrion* v. *Jicarillo Apache Tribe*, 455 U.S. 130, (1982), *Washington* v. *Confederated Tribes of the Colville Reservation* 447 U.S. 134 (1980), *Cardin* v. *De La Cruz*, 671 F.2d. 363 (9th Cir. 1982), U.S. Cert. denied 103 S.Ct. 293, *United States* v. *Mazurie*, 419 U.S. 544 (1975).

4. Right Of Reservation Indians To Govern Themselves.

The most important interest of all concerns the right of reservation Indians to "make their own laws and to be ruled by them." *Williams* v. *Lee*, 358 U.S. at 200, 79 S.Ct. at 271:

> "The whole basis of our notions of personal jurisdiction if grounded on the principle that the forum where the wrong was committed—where the injury was suffered, is the appropriate place to sue." *Babbitt Ford, supra*, 519 F. Supp. at 428.

The above assertion is especially applicable in the instant case due to the general federal interest in furthering Indian Self-Government. See *Morton* v. *Mancari*, 417 U.S. 535, 555, (1974), and also due to a specific tribal interest in the tribe's young people:

> "Recognizing the special relationship between the United States and Indian Tribes and their members and the federal responsibility to Indian people, and Congress finds . . . that there is no resource that is more vital to the continued existence and integrity of Indian Tribes than their children . . ." See *Indian Child Welfare Act*, Codified at 25 U.S.C. 1901 (3).

Clearly, the tribe has an important interest in providing a forum to an Indian child.

5. Availability Of A Forum.

One final point must be made. The right to litigate problems arising on a reservation in a tribe's own forum, guaranteed in *Williams* v. *Lee*, Must be upheld for the reason that no other forum exists with jurisdiction over

the instant case. Federal jurisdiction does not exist for two reasons. First, no diversity of citizenship exists as Not Afraid and the Lodge Grass School District No. 27 are citizens of the same state. Second, a tort committed against an Indian is not a federal question.

The State of Montana has not complied with the federal statutory procedure by which it could obtain jurisdiction of civil causes of action arising with the Crow Reservation. See 25 U.S.C. § 1322. Therefore, no State jurisdiction exists. *Kennerly* v. *District Court*, 400 U.S. 423, (1971). *State Ex Rel Flammond* v. *Flammond*, ___ Mont. ___, 621 P.2d. 471 (1980). The Montana Supreme Court, noting the state's non-compliance with 25 U.S.C. 1321-1326, refused to exercise civil jurisdiction of a cause of action involving an Indian and non-Indian which arose on the Blackfeet Reservation. The sole exception arises when the event complained of involves significant or substantial events off the reservation. *Flammond, supra*, at 472. See also *Fisher* v. *District Court*, 424 U.S. 382, (1976), and *Crawford* v. *Roy*, 176 Mont. 227.

Since no off-reservation events occurred in the instant case, the State of Montana would not exercise jurisdiction. Clearly, the failure to uphold the tribe's jurisdiction in the instant case would create a situation inimical to the Congressional interest in insuring law and order on the Indian Reservations.

VI. THERE IS NO STATE INTEREST REQUIRING A DENIAL OF CROW TORT JURISDICTION.

A. Introduction.

We now search for some interest of the State of Montana which could possibly justify a denial of Crow Tort Jurisdiction over this case.

B. Sovereign Immunity.

Although we title this section "Sovereign Immunity," we are not sure of what we talk about because National has only hinted at the exact nature of its claim for "immunity." At any rate, we offer the following.

The case of *Parden* v. *Terminal Ry. Co.* 377 U.S. 184, (1964) involved a FELA action of citizens of Alabama against a railroad owned and operated in Interstate Commerce by the State of Alabama. On Certiorari from the Fifth Circuit, the Supreme Court, Mr. Justice Brennan held that a State that owns and operates a railroad in Interstate Commerce may not plead sovereign immunity as a defense to the suit. His opinion states:

> "By empowering Congress to regulate commerce, then, States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation." 377 U.S. at 192.

Nevada v. *Hall*, 440 U.S. 419, (1979) also limits sovereign immunity. Here the plaintiff's were involved in an automobile accident in California, with a vehicle driven by an employee of the State of Nevada. Plaintiff sued the State of Nevada for damages in the California courts. California law granted the unlimited right of recovery for damages. Nevada retained limited sovereign immunity from such a suit, and raised its immunity as a defense in the California Courts. On Certiorari, the Supreme Court, Mr. Justice Stevens held that Nevada could not claim such immunity when it was sued for its torts committed in California. Justice Stevens ruled:

> "In this Nation each sovereign governs only with the consent of the governed. The people of Nevada have consented to a system in which their State is subject only to limited liability in tort. But the people of California, who have had no voice in Nevada's decision, have adopted a different system. Each of these

decisions is equally entitled to our respect." 440 U.S. at 426.

A similar rationale resulted in the decision of *Georgia* v. *Chattanooga*, 264 U.S. 472, holding that land acquired by one state in another state is held subject to the laws of the latter and to all the incidents of private ownership. The proprietary right of the owning state does not restrict or modify the power of eminent domain of the state wherein the land is situated.

These holdings are analogous to this case. To understand the analogy, it is necessary to review the doctrine of Indian Sovereignty.

Chief Justice Marshall stated in *Worchester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832):

> "The Cherokee Nation . . . is a distinct community . . . in which the laws of Georgia can have no force . . . but with the assent of the Cherokees themselves, or in conformity with treaties, and with the Acts of Congress."

Of course, this doctrine has been subjected over the years to a great deal of interpretation, and even modification in light of various treaties and acts of Congress. See outline of this history set forth in *McClanahan* v. *State Tax Commission*, 14 Ariz. App. 542, 454, 434, P.2d. 221, 223 (1970).

"But it is nonetheless still true, as it was in the last century, that [t]he relation of the Indian tribes living within the borders of the United States [is] an anomalous one of a complex character . . . they were and always have been regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations,

and thus far, not brought under the laws of the Union, or of the state within whose limits they reside." *United States* v. *Kagama*, 118 U.S. 375, 381-382.

Williams v. *Lee*, *supra*, upheld this retained sovereignty in a context similar to this case. Justice Black, upholding the inherent jurisdiction of the Navajo Tribal Court over the collection of a debt owned by Indians to a non-Indian merchant for a debt contracted on the reservation, stated:

> "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the Tribal Courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. Cf. *Donnelly* v. *United States*, *supra; United States*, *supra*. The cases in Court have consistently guarded the authority of Indian government over their reservations." *Id.* at 223

It is significant that Montana, like Arizona is, by Act of Congress, namely, the ICRA, Public Law 280, and by express declaimers in its Organic Act, Enabling Act, and its Constitutions, restrained from exercising "jurisdiction over civil causes of action between Indians or to which Indians are parties which occur in the Indian Country situated with such states." 25 U.S.C. § 1322. Finally, it must be remembered that tribal sovereignty is subordinate only to the Federal Government not the states. *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1978).

This brief review reveals that Indian sovereignty, whatever its limits, is not subject to state interference, unless Congress specifically calls for such. No such intent has been shown as to civil jurisdiction. There is then, no rational basis for a rule governing sovereign immunity to

Montana. This case is no different from those rules cited above. Like the *Parden* holding, *supra*, Montana surrendered its immunity to the plenary power of Congress over Indians. U.S. Const. Art. I Sec. 8. Like the *Hall* holding, *supra*, the laws of the Crow Tribe are entitled to just as much respect as those of Montana. When the State of Montana decided in 1911 to establish a school in Indian Country, it, at the same time, submitted itself to the laws of Indian Country and waived its immunity from suit in the Crow Tribal Court.

Like the *Georgia* case, *supra*, the school lands of the State of Montana within Indian Country are subject to the power of the Crow Nation wherein they are situated.

Some other analogies also show no need to afford immunity.

Indian tribes have the power to tax the activities of non-Indians taking jurisdiction on indian lands in cases where the tribe has a significant interest in the subject matter. *Washington* v. *Confederated Tribes of Colville*, *supra*. The power to tax is the power to adjust rights of ownership in property. The power of a court which awards judgments for damages arising from torts also adjusts rights of ownership of property. Thus, the power of Tribal Courts to adjudicate tort claims against non-Indians arising from their conduct on a reservation is consistent with the recognized power to tax non-Indians, and is no more of an intrusion upon the interests of the State of Montana then those that have already been sanctioned by this Court.

Likewise, the power to regulate non-Indians is recognized as an attribute of sovereignty and policy of Congress. *U.S.* v. *Mazurie*, 419 U.S. 544, 557 (1975). The power to regulate is no more extensive than the power to

adjudicate a civil dispute arising from a tort. To recognize the former calls for recognition of the latter.

In summary, we see no precedent or reason for giving Montana or non-Indians immunity from Crow Tort Jurisdiction.

C. The Obligation To Operate A School.

Exercise of Crow Tort Jurisdiction does not hamper Respondents' operation of their school. Sovereign Immunity is waived as to the claim itself. 2-9-102 M.C.A. This is conceded. Pet. Brief, *supra*, at p. 21. They, thus, concede they must defend Not Afraid's claim. They only object to the forum. How does this interfere with the operation of a school? They have not shown that it does. We submit it does not.

Execution on the judgment which Petitioner claims "paralyzed" discharge of its duties to provide education, is not related to the question of jurisdiction now before this Court. Pet. Brief, p. 22. If the Tribal Court has jurisdiction over this controversy, it certainly has power to enforce its judgment. When the Court of Appeals mandate became effective, it in effect upheld the Tribal Court judgment. If National desired to avoid execution, it should have obtained a stay prior to the issuance of the Writ of Execution. It had an effective means of avoiding seizure of its property; it refused to avail itself of its remedies. As to the claim that State law prescribes the method of satisfying a judgment against a school district, we reply that it should be obvious that if the tribe has jurisdiction over this matter, it also has the power to enforce its judgment by its own laws, and is not fettered by state laws.

The tribal court did not attempt to regulate or interfere with the operation of the school in any way. It merely

attempted to adjudicate a tort claim. We simply cannot see how state education process are impeded by Crow Tort Jurisdiction.

D. Constitutional Considerations.

Amicus Salt River, Amicus brief, Salt River Project, Agriculture Improvement and Power District and Arizona Public Services Company, suggests that Art. III, U.S. Constitution, forbids Crow Tort Jurisdiction. Br. Amicus, Salt River, p. 9. This is novel. They appear to reason that because Art. III mandates appellate review and the Court of Appeals denied review, therefore, non-Indians should not be subject to Crow Tort Jurisdiction. We do not follow this argument, because first, there is ample opportunity for federal review as set forth above. Second, as also pointed out above, Indian Jurisdiction does not derive from the Constitution, but from the Indians themselves, and their treaties with the United States. Thirdly, the proposal for District Court review does not resolve the problems we discussed above inherent in making the District Court an appellat court to the tribal court.

As stated in *United States* v. *Kagama*, 118 U.S. 375 (1886), the Indians "owe no allegiance to the states, and receive from them no protection. Because of the local ill-feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing from the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power." 118 U.S. at 384. A bibliography of the Indian cases coming before this court would, for the most part, substantiate a longstanding conflict between state and tribal authorities. Indeed, the States consist mostly of non-Indians. It is to receive protection from the powers of the state that Indians live

on reservations. If anything, the presence of the state authorities, subdivisions or institutions inside the reservation *calls for greater affirmation of Indian sovereignty*, instead of state immunity as claimed.

VI. THE CROW TRIBAL COURT HAS ADJUDICATED WITH EQUITY AND JUSTICE

The Crow Tribal Court has a modern code. See Joint Appendix A and B. It is equipped to handle this case through the appeal level. *Ibid*, Appendix C. It has shown it is fair and is prepared to afford every proper remedy and right due National, if it would appear before that court. The jurisdiction in the Tribal Court will be wisely exercised and will not only afford self-government to Not Afraid, but justice to the Lodge Grass School.

CONCLUSION

For the reasons given above, the judgment of the Court of Appeals should be affirmed and the jurisdiction of the Crow Tribal Court over the torts of non-Indians upheld.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
FEB 21 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-320

In the Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES, ET AL., PETITIONERS

v.

CROW TRIBE OF INDIANS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether a federal court may enjoin Indian tribal court proceedings against a non-Indian on the ground that the tribal court has exceeded its jurisdiction.

2. Whether an Indian tribal court may exercise civil jurisdiction over non-Indians to redress personal injuries to a tribal member allegedly caused by the negligent maintenance of a dangerous condition on State-owned land within the Reservation where a large number of Indian children attend school.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	3
Argument:	
I. The federal court may exercise its injunctive powers to keep the tribal court within its proper bounds	5
II. The tribal court has jurisdiction to entertain the underlying controversy	8
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Alberty v. *United States*, 162 U.S. 499	16
Babbitt Ford, Inc. v. *Navajo Indian Tribe*, 710 F.2d 587, cert. denied, No. 83-610 (Apr. 2, 1984)	17
Cardin v. *De La Cruz*, 671 F.2d 363, cert. denied, 459 U.S. 967	17
Cowan v. *Rosebud Sioux Tribe*, 404 F. Supp. 1338	17
DeCoteau v. *District County Court*, 420 U.S. 425	13
Helicopteros Nacionales de Colombia v. *Hall*, No. 82-1127 (Apr. 24, 1984)	18
International Shoe Co. v. *Washington*, 326 U.S. 310	18
Kennerly v. *District Court*, 400 U.S. 423	9
Lawrence Co. v. *Lead-Deadwood School Dist.*, No. 83-240 (Jan. 9, 1985)	6
Longpre v. *Joint School Dist. No. 2*, 151 Mont. 345, 443 P.2d 1	11
Mattz v. *Arnett*, 412 U.S. 481	13
Mayfield, In re, 141 U.S. 107	16
McClanahan v. *Arizona State Tax Comm'n*, 411 U.S. 164	19

Cases—Continued: Page

Merrion v. *Jicarilla Apache Tribe*, 455 U.S. 130....6, 9, 13
Montana v. *Peretti*, 661 F.2d 756 11
Montana v. *United States*, 450 U.S. 544 .....9, 12, 13, 15, 18, 19
Morris v. *Hitchcock*, 194 U.S. 384 16
Mt. Healthy City School District v. *Doyle*, 429 U.S. 274 11
Nevada v. *Hall*, 440 U.S. 410 10
New Mexico v. *Mescalero Apache Tribe*, No. 82-331 (June 13, 1983) 9, 18
Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191.. 6, 14
Oneida Indian Nation v. *County of Oneida*, 414 U.S. 661 6
Pennhurst State School & Hospital v. *Halderman*, No. 81-2101 (Jan. 23, 1984) 11
Ramah Navajo School Board, Inc. v. *Bureau of Revenue*, 458 U.S. 832 9
Santa Clara Pueblo v. *Martinez*, 436 U.S. 49 .....6, 9, 18
Seymour v. *Superintendent*, 368 U.S. 351 13
Solem v. *Bartlett*, No. 82-1253 (Feb. 22, 1984).... 13
Three Affiliated Tribes v. *Wold Engineering*, No. 82-629 (May 29, 1984) 18
United States v. *Antelope*, 430 U.S. 641 9
United States v. *Clapox*, 35 F. 575 16
United States v. *Mazurie*, 419 U.S. 544 ..... 8, 9
United States v. *Mission Golf Course, Inc.*, 548 F. Supp. 1177, aff'd, 716 F.2d 907, cert. denied, No. 83-606 (Jan. 9, 1984) 12
United States v. *Wheeler*, 435 U.S. 313 ..... 6, 9
Warren Trading Post Co. v. *Arizona Tax Comm'n*, 380 U.S. 685 9
Washington v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 .....6, 9, 14
White Mountain Apache Tribe v. *Bracker*, 448 U.S. 136 ..... 1, 9
Williams v. *Lee*, 358 U.S. 217 .....1, 9, 15, 17, 18
Worcester v. *Georgia*, 31 U.S. (6 Pet.) 515 9
World-Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286 18

Constitution, treaties and statutes: Page

U.S. Const.:
Amend. XI 11
Amend. XIV (Equal Protection Clause) 12
Mont. Const. Art. II:
§ 18 (1972) 10
§ 18 (1974) 10
Second Treaty of Fort Laramie, May 7, 1868, art. 1, 15 Stat. 649 14
Treaty of July 19, 1866, art. 13, 14 Stat. 803 16
Treaty with the Navajos, June 1, 1868, art. 1, 15 Stat. 667 15
Act of May 2, 1890, ch. 182, 26 Stat. 81 *et seq.*:
§ 30, 26 Stat. 94 15
§ 31, 26 Stat. 94 15
Act of June 28, 1898, ch. 517, § 28, 30 Stat. 504..... 15
Act of Apr. 26, 1906, ch. 1876, § 1, 34 Stat. 137..... 16
Crow Allotment Act of 1920, ch. 224, § 16, 41 Stat. 756 12
8 U.S.C. (1976 ed.) 1401(a)(2) 12
28 U.S.C. 1331 ..... 5, 6
Mont. Code Ann. (1983):
§ 2-9-101(5) 10
§ 2-9-102 11
§ 2-9-311 11
§ 2-9-318 8

Miscellaneous:

Cohen, *Handbook of Federal Indian Law* (1942).... 15
Comment, *The Passing of Sovereign Immunity in Montana: The King is Dead*, 34 Mont. L. Rev. 283 (1973) 10
D. Getches, et al., *Cases and Materials on Federal Indian Law* (1979) 16
NAICJA Report, *Native American Tribal Court Profiles 1984* 17
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Miscellaneous—Continued: Page

7 Op. Att'y Gen. 174 (1855) 15
Powers of Indian Tribes, 55 Interior Dec. 14 (1934) 15
President's Statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98 (Jan. 24, 1983) 1
R. Strickland, et al., *Felix S. Cohen's Handbook of Federal Indian Law* (1982) 16

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

The United States has long been committed to furthering the goal of self-government and self-determination for Indian Tribes. See, *e.g.*, *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143-144 & n.10 (1980); President's Statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98 (Jan. 24, 1983). One aspect of that responsibility is to encourage respect for tribal institutions, including the tribal courts. Hence, participation of the United States in cases of this kind at least since *Williams* v. *Lee*, 358 U.S. 217 (1959). So here: we deem it appropriate to present our views on the question of tribal jurisdiction over activities within a Reservation that significantly affect the welfare of tribal members.

STATEMENT

In May 1982, a Crow Indian child, Leroy Sage, was struck by a motorcycle on the grounds of the Lodge Grass Elementary School within the Crow Reservation in Montana. The school is situated on State-owned Reservation land and its student body is 85% Crow Indian. Sage, through his guardian, filed suit against Lodge Grass School District No. 27 in Crow Tribal Court alleging that his injuries were caused by the negligent conduct of the school, specifically, the unsafe condition of the school parking lot and inadequate supervision during school hours. Process was served on the school board chairman, who failed to notify anyone else of the summons. The school district did not answer or appear and, in due course, on October 19, 1982, the tribal court entered a default judgment for $153,000 against the school district. Pet. App. 2a-3a, 15a-16a.

On November 2, 1982, having received notice of this judgment, the school district and its insurance company filed suit in federal district court alleging that the tribal court lacked subject matter jurisdiction over the controversy. Accepting that argument, the district court permanently enjoined enforcement of the tribal court order. Pet. App. 14a-27a. The Court of Appeals for the Ninth Circuit reversed, holding that a federal court could not enjoin the tribal court proceeding. Pet. App. 1a-7a. Judge Wright concurred in the result on the ground that the district court should not have intervened before requiring the plaintiffs to exhaust their tribal court remedies. Pet. App. 8a-13a.

Shortly after the court of appeals' decision, on August 1, 1984, the Crow Tribal Court issued a writ of execution pursuant to which certain property of

the school district was seized. Sale of the property was scheduled for August 23. On August 22, the school district appeared in the tribal court, seeking to enjoin the sale and to set aside the default judgment. The court, in orders dated August 22 and August 23, postponed the sale, and set a hearing to consider the school district's motion to set aside the default judgment. Br. in Opp. App. 1a-9a.

The school district also applied to Justice Rehnquist for a stay of the Ninth Circuit's mandate. Justice Rehnquist issued a temporary stay on August 21 and continued the stay on September 10. Reply Br. App. 1a-8a. On September 19, the tribal court entered an order postponing a ruling upon the motion to set aside the default judgment until after final review of the federal court proceedings by this Court. Br. in Opp. App. 10a-15a.

SUMMARY OF ARGUMENT

The District Court in this case held, first, that it could entertain a complaint against the exercise of power by the Crow Tribal Court allegedly outside its jurisdiction, and, second, that the latter court wholly lacked subject matter jurisdiction to entertain a personal injury claim by a Crow child against a State school district with respect to conduct occurring on State-owned land within the Indian Reservation. We believe the first ruling was correct, but the second erroneous.

I

Undeniably, the sovereign powers of Indian Tribes over non-Indians have been circumscribed by the reality of their "dependent status," even when no specific provision of treaty or statute expressly so stipulates. Such limitations on tribal sovereignty are nec-

essarily the consequence of federal law and it follows that anyone claiming immunity from tribal jurisdiction on this basis is asserting a federal right within the competence of the federal courts to adjudicate. Unlike an allegation of violation of the Indian Civil Rights Act, for which an apparently exclusive remedy has been provided, there is no reason to deny the availability of injunctive relief to a non-Indian whose complaint is that the tribal court is acting wholly beyond its jurisdiction.

Of course, federal courts should not always exercise their equitable jurisdiction at the earliest opportunity, especially when an adequate remedy may be available in another tribunal. Thus, here, even if intervention otherwise had been justified, it might have been appropriate for the district court to require petitioners first to seek relief in the tribal court system. But, in our view, that question is mooted because the facts presented to the federal court disclosed a case properly within tribal jurisdiction. In the present context, there is no occasion to decide under what circumstances, if any, a federal court may collaterally review tribal court judgments on grounds other than the subject matter jurisdiction of the tribal court.

II

Our submission in support of tribal court jurisdiction is limited to circumstances like those alleged here. This Court repeatedly has stressed the residual sovereignty of Indian Tribes and the governmental authority they enjoy over their diminished territory, including, in some cases, the activities of non-Indians on "fee" parcels within the Reservation. When such activities significantly affect tribal members, they are subject to regulation and taxation by the Tribe.

There is no reason to view differently the exercise of civil jurisdiction by the tribal judiciary in like circumstances. Montana has apparently waived any sovereign immunity it might possess and the hazardous situation described in the present complaint, potentially endangering a significant portion of the Tribe's younger membership, justified the tribal court's acceptance of the case. Accordingly, those proceedings ought to be permitted to go forward without federal court interference, at least at this stage.

ARGUMENT

I. THE FEDERAL COURT MAY EXERCISE ITS INJUNCTIVE POWERS TO KEEP THE TRIBAL COURT WITHIN ITS PROPER BOUNDS

We are unable to endorse the holding of the majority of the court of appeals that federal courts lack power to intervene when a tribal court acts beyond its jurisdiction. On the contrary, we share the objections to such a rule stated by Judge Wright in his concurring opinion below (Pet. App. 8a-13a), by Justice Rehnquist in his opinion accompanying the stay orders (Pet. Reply Br. App. 1a-8a), and by petitioners here. In our view, because the boundaries of tribal jurisdiction are defined by federal law, a non-Indian claiming injury from tribal "jurisdictional excesses" states a "federal question" case under Section 1331 of the Judicial Code, and the appropriate United States District Court may entertain the complaint, and, if the facts warrant it, enjoin further proceedings in the tribal court. We now urge affirmance of the judgment vacating the federal court injunction because we believe the circumstances alleged show, on balance, that the tribal court did *not* exceed its jurisdiction. But we have no doubt that

the district court was correct in entertaining the question, albeit we submit it reached the wrong conclusion on the merits.

1. It is clear enough that Indian Tribes lost some of their aboriginal sovereignty when they were brought under the dominion of the United States and assumed a "dependent status." *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 206, 209-210 (1978); *United States* v. *Wheeler*, 435 U.S. 313, 323, 326 (1978). At least in the eye of the law, that consequence resulted from federal action, since the national sovereign alone has power to diminish tribal independence. *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982); *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153-154 (1980); *United States* v. *Wheeler*, 435 U.S. at 323. Accordingly, all limitations on tribal powers necessarily derive from federal law—whether in the form of constitutional principles, treaties and statutes, or "rudimentary propositions" of "Indian law." See *Oliphant*, 435 U.S. at 206; *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 670 (1974). And those who invoke these limitations as affording immunity from tribal jurisdiction are claiming a federal right and stating a "federal question" case under Section 1331 of the Judicial Code. Cf. *Oneida*, 414 U.S. at 667-678; *Lawrence Co.* v. *Lead-Deadwood School Dist.*, No. 83-240 (Jan. 9, 1985), slip op. 3-4 n.6.

2. In this context, we see no obstacle to conceding a private right of action in the non-Indian who alleges that he is improperly subjected to tribal court jurisdiction. Unlike the situation under the Indian Civil Rights Act, here Congress has not implicitly restricted the remedy. Compare *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978). In a case like this

one, where the allegation is that the Tribe is acting wholly outside its jurisdiction, there is no reason to deny the availability of injunctive relief in a federal court at the instance of a suitor claiming injury from tribal "jurisdictional excess."

As the court of appeals recognized, this has been the prevailing view when an Indian Tribe is alleged to have overstepped applicable boundaries through legislation or regulation. Pet. App. 5a-6a. Like petitioner, we cannot appreciate why the same rule should not govern when the claim is that a tribal *court*, instead of a tribal council, has exceeded its jurisdiction. The federal court's power is no less because the Tribe is acting judicially rather than through legislation.

3. Of course, a federal court's exercise of its injunctive power is circumscribed by traditional equitable limitations. For instance, injunctive relief may be withheld if the plaintiff has an "adequate remedy at law." In the present case, the petitioners could have contested tribal court jurisdiction, at the outset, in the tribal court. The availability of a tribal court remedy perhaps should have cautioned the district court to withhold federal injunctive relief. So, also, this Court may wish to defer decision as to the scope of the tribal court's jurisdiction, since that issue was not passed upon by the court of appeals and is pending before the tribal court. On the other hand, we believe the facts presented to the district court indicate a case within tribal court jurisdiction, and, of course, if that is correct, the federal court had no ground for intervening, at least at this stage.[1]

[1] We believe it is premature to discuss the circumstances, if any, that would justify a federal court in reviewing tribal court proceedings for procedural regularity or the legality of

II. THE TRIBAL COURT HAS JURISDICTION TO ENTERTAIN THE UNDERLYING CONTROVERSY

In our view, the ultimate question—whether the tribal court permissibly exercised jurisdiction over the tort claim alleged—is not without difficulty, particularly in light of the limited record before this Court. Nevertheless, if the issue is deemed ripe for decision, we suggest an affirmative answer. In reaching that conclusion, we eschew both extreme positions. We cannot endorse the proposition that every incident occurring within an Indian Reservation is, for that reason alone, subject to tribal jurisdiction. At the same time, we think it clear that tribal courts may adjudicate some Reservation-based claims asserted against non-Indians. Our submission is simply that the present case falls within this relatively narrow category.

1. It is useful, at the outset, to lay to rest any invitation to re-open the venerable debate whether the surviving Indian Tribes, within their diminished Reservations, are merely "private, voluntary organizations," or, rather, should be recognized as "unique aggregations possessing attributes of sovereignty over both their members and their territory." *E.g.*, *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975). Of course, everyone concedes the authority of Tribes to determine their membership, to regulate, assess and discipline members, and to control the use of tribal

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particular means of executing a tribal court judgment. We merely suggest that principles of comity may well counsel a tribal court to follow state law with respect to the immunity of governmental property from seizure. *E.g.*, Mont. Code Ann. § 2-9-318 (1983). Here, we have every reason to anticipate that the ultimate judgment of the Crow Tribal Court, if its jurisdiction is vindicated by the decision of this Court, will be satisfied without putting that proposition to the test.

land. But those are the prerogatives of every private association. To read this Court's decisions as saying nothing more is to trivialize them. From *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832), through *New Mexico* v. *Mescalero Apache Tribe*, No. 82-331 (June 13, 1983), slip. op. 8-9, 11-12, the Court has emphasized that Indian Tribes constitute "*political* communities," enjoying substantial "*sovereign*" powers over both members and nonmembers when within Reservation boundaries. Looking only to the last 25 years, that point has been made no less than a dozen times. See *Williams* v. *Lee*, 358 U.S. 217, 223 (1959); *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685, 690-692 (1965); *Kennerly* v. *District Court*, 400 U.S. 423, 426-427 (1971); *United States* v. *Mazurie*, 419 U.S. at 557-558; *United States* v. *Antelope*, 430 U.S. 641, 645 (1977); *United States* v. *Wheeler*, 435 U.S. at 323; *Santa Clara Pueblo* v. *Martinez*, 436 U.S. at 55-56; *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 152-154; *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142, 151 (1980); *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. at 140, 146-148; *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue*, 458 U.S. 832, 837-838 (1982); *New Mexico* v. *Mescalero Apache Tribe*, slip op. 8-12.

Accordingly, we take it as settled that some non-Indians, in some circumstances, are subject to some kinds of tribal jurisdiction. Recognition of that reality, it is true, does not immediately resolve the case before us. There are limits to the power of Indian Tribes over non-Indians, and the question is whether the Crow Tribal Court's exercise of jurisdic-

tion here transgresses any such bounds. To find the answer, we must examine several potential objections peculiar to the circumstances of this case.

2. Because the underlying tort claim is directed against Lodge Grass School District No. 27, a "political subdivision" of Montana (see Mont. Code Ann. § 2-9-101(5) (1983)), troubling questions concerning state sovereign immunity are implicated. In the circumstances of this case, however, we believe no insurmountable barrier exists.

It is not clear whether a state would in any event retain its sovereign immunity from suit in tribal courts. But, in our view, that question need not be reached in this case because Montana has waived its immunity from tribal court suits. In 1972, the State amended its constitution to provide that "[t]he state * * * and all * * * local governmental entities shall have no immunity from suit for injury to a person or property * * *." Mont. Const. Art. II, § 18. This broad and unqualified waiver is remarkable. Shortly after its passage, one commentator noted,

> This bold constitutional step places Montana in a situation which is unique among the fifty states. Only this jurisdiction has moved to abolish the doctrine of sovereign immunity, *without limitation*, by constitutional fiat.

Comment, *The Passing of Sovereign Immunity in Montana: The King is Dead*, 34 Mont. L. Rev. 283 (1973) (emphasis in original). Two years later, the State constitution was amended to permit exceptions to the waiver of sovereign immunity, but only "as may be *specifically* provided by a 2/3 vote of each house of the legislature." Mont. Const. Art. II, § 18 (1974) (emphasis added). No such law addressed to tribal

court suits having been enacted, it is reasonable to take Montana at its word and construe its constitutional and statutory waiver of immunity (Mont. Code Ann. § 2-9-102 (1983)) as encompassing actions filed in tribal court.[2]

Our conclusion is the more easily justified because a local school district is involved. Unlike arms of the central state government, school districts, defined by state law as "political subdivisions," are not entitled to sovereign immunity under the Eleventh Amendment. See *Mt. Healthy City School District* v. *Doyle*, 429 U.S. 274, 280 (1977).[3] Indeed, even before the constitutional waiver of sovereign immunity in 1972, the Montana Supreme Court concluded that school districts were amenable to suit to the limits of their liability insurance. See *Longpre* v. *Joint School Dist. No. 2*, 151 Mont. 345, 443 P.2d 1 (1968). Accordingly, it is not surprising that sovereign immunity from suit was not a ground relied upon by the district court and is only mentioned in a half-hearted way both by the petitioners (Pet. Br. 20-22) and by the State of Montana itself (Eleven Amicus Curiae States Br. 35-36 & n.8).

For much the same reason, the claim of exemption likewise fails if stated more expansively as an

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[2] Petitioners' citation to Mont. Code Ann. § 2-9-311 (1983) as giving Montana's state courts "exclusive" jurisdiction of tort actions against state agencies (Pet. 21) is misleading. The provision merely confers jurisdiction—without any suggestion that the grant is exclusive.

[3] This alone distinguishes the Ninth Circuit ruling in *Montana* v. *Peretti*, 661 F.2d 756 (1981), that Montana's waiver of sovereign immunity is not sufficiently explicit to overcome the barrier of the Eleventh Amendment in federal courts. See *Pennhurst State School & Hospital* v. *Halderman*, No. 81-2101 (Jan. 23, 1984).

assertion that the State and its instrumentalities are altogether beyond tribal jurisdiction, whether exercised through courts or other organs of government. The Lodge Grass Elementary School is in no sense an involuntary hostage on the Reservation. So far as we are aware, Montana's taking up the grant of Sections 16 and 36 within the Crow Reservation carried with it no obligation to establish schools there, and, in any event, nothing compelled the State to seek or accept the offer.[4] In these circumstances, it seems appropriate to hold that State agents relinquish their special status when they enter an Indian Reservation and their conduct there directly affects the welfare of the Tribe. Cf. *United States* v. *Mission Golf Course, Inc.*, 548 F. Supp. 1177 (D.S.D. 1982), aff'd, 716 F.2d 907 (8th Cir. 1983), cert. denied, No. 83-606 (Jan. 9, 1984).

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[4] We assume, without independent knowledge, that petitioners are correct in asserting (Pet. Br. 3-4, 20) that the land in question was acquired by the State pursuant to Section 16 of the Crow Allotment Act of 1920, ch. 224, 41 Stat. 756, which tendered to the State the traditional "school sections" within the Crow Reservation (see Pet. App. 19a n.2)—albeit the Reservation had been established by treaty in 1868, long before Montana achieved statehood. See *Montana* v. *United States*, 450 U.S. at 548, 553-554, 558-559. In return, Montana promised to permit Crow Indian children "to attend the public schools of said state on the same conditions as the children of white citizens of said state." *Ibid.* Nothing in this proviso directly required the State to maintain a school on each—or any—Sections 16 and 36 within the Crow Reservation. On its face, the undertaking is no more than what the Equal Protection Clause of the Fourteenth Amendment in any event mandated, at least after the Crow became State citizens in 1924. See 8 U.S.C. (1976 ed.) 1401(a)(2). But, however that may be, it is perfectly clear that federal law did not compel Montana to enter the Crow Reservation by taking up the option to acquire one or more Sections 16 and 36.

3. Plainly, the situs of the tort on non-Indian land cannot be dispositive. As the Court has stressed, Indian Tribes are not mere landowners: they wield *governmental* powers. *Merrion*, 455 U.S. at 137-141, 145-149. There is, to be sure, a geographic limitation on tribal jurisdiction—at least when asserted over nonmembers. But that boundary is the perimeter of the *Reservation*, not the plot line of each "fee" parcel within it. That is one reason why it matters whether alienated tracts or portions of a Reservation opened up to entry by homesteaders remain "Indian country." See *Seymour* v. *Superintendent*, 368 U.S. 351 (1962); *Mattz* v. *Arnett*, 412 U.S. 481 (1973); *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975); *Solem* v. *Bartlett*, No. 82-1253 (Feb. 22, 1984), slip op. 2 nn.1&2, 4. It is, moreover, what the Court expressly said in *Montana* v. *United States*, 450 U.S. at 565 (citations omitted):

> * * * Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. * * * A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. * * *

4. Nor do non-Indians enjoy a unique immunity from the Tribe's *judicial* arm. Just as petitioners insist (correctly, we think) that *federal* jurisdiction

to correct tribal "jurisdictional excesses" does not depend upon whether the Tribe is acting judicially or legislatively, so we assert that *tribal* jurisdiction is no less when exercised judicially instead of legislatively. It is no answer that Indian Tribes cannot criminally prosecute non-Indians for offenses committed on the Reservation, even crimes against members occurring on tribal lands. *Oliphant* v. *Suquamish Indian Tribe*, *supra*. A sufficient reason for that rule is not peculiar to the Indian tribunal: The non-Indian is simply not subject to substantive tribal criminal law. See *Colville*, 447 U.S. at 153.

Our history of Indian affairs indicates that the absence of tribal criminal jurisdiction over non-Indians is no basis for disabling Indian Tribes from exercising civil jurisdiction over non-Indians. Indeed, as *Oliphant* itself stresses, national policy, evidenced in federal legislation from the Trade and Intercourse Act of 1790 to the Major Crimes Act of 1885 and a long line of treaty provisions, has subjected non-Indians committing offenses against tribal members to *federal* criminal law, administered by the *federal* courts. 435 U.S. at 198-203. And this, the Court concluded, reflected the "commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians." *Id.* at 206. But there is nothing comparable on the civil side. Except for a brief and unusual transitional period in the Indian Territory (note 6, *infra*), no treaty nor statute has ever provided for federal adjudication of Reservation-based civil cases involving non-Indians.[5] On the contrary,

[5] We do not accept the contrary implication sought to be drawn from Article 1 of the Second Treaty of Fort Laramie, May 7, 1868, 15 Stat. 649, by the State of Washington as amicus curiae (Br. 8-10). The cited provision deals only with *criminal* offenses and, incidentally, obligates the United States to make whole the Indian victim of a non-Indian crime. Obviously, this does not remotely speak to the jurisdiction of the Tribe to exercise civil jurisdiction over non-Indians in a non-criminal context. Indeed, Washington's argument is foreclosed by this Court's ruling in *Williams* v. *Lee*, *supra*, which sustained tribal court jurisdiction over a non-Indian doing business on the Reservation in the face of an identical provision in the Treaty with the Navajos, June 1, 1868, Art. 1, 15 Stat. 667.

the different rule applicable in respect of tribal assertions of civil jurisdiction was expressly noted as early in 1855 in an Opinion of the Attorney General cited by this Court in *Oliphant*. 7 Op. Att'y Gen. 174, cited, 435 U.S. at 199.

Thus, once it is recognized that Tribes "retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations," *Montana*, 450 U.S. at 565, there is no reason to exclude the jurisdiction of the tribal courts in cases where substantive tribal law governs non-Indians. As Felix Cohen has summarized the matter, "the judicial powers of the tribe are coextensive with its legislative or executive powers." Cohen, *Handbook of Federal Indian Law* 145 (1942). Accord, *Powers of Indian Tribes*, 55 Interior Dec. 14, 56 (1934). It would be strange, indeed, if, in a given instance, a non-Indian were subject to tribal taxation or regulation, but could not be made answerable in tribal court to assure compliance with the relevant ordinance.[6]

[6] That awkward circumstance did prevail, for a short time, in the Indian Territory after Congress first restricted the exclusive jurisdiction of the tribal courts of the Five Civilized Tribes to cases in which members were "the sole parties" (Act of May 2, 1890, ch. 182, §§ 30, 31, 26 Stat. 94), and, eight years later, abolished those tribunals altogether (Act of June 28, 1898, ch. 517, § 28, 30 Stat. 504). See Cohen, *supra*,

5. We must not be misled because there is little record, until recently, of Indian tribunals exercising civil jurisdiction over non-Indian defendants. Except for the Five Civilized Tribes whose institutions were soon severely curtailed, the fact is that judicial tribunals, in the white man's sense, were largely unknown in the traditional Indian world. They were first introduced into Indian country as "courts of Indian offenses," effectively agencies of federal police administration with limited jurisdiction. *United States* v. *Clapox*, 35 F. 575 (D. Or. 1888). See D. Getches, et al., *Cases and Materials on Federal Indian Law* 313-317 (1979); R. Strickland, et al., *Felix S. Cohen's Handbook of Federal Indian Law* 333-334 (1982). And where genuine tribal courts ultimately developed, they suffered other set-backs. As one recent study concludes (National American Indian Court Judges Association, *Indian Courts and the Future* 13 (1978)):

> Overall, Indian courts have been retarded by their history. They originally were vehicles of an outside force. Later, their intended growth as

at 363 n.29, 430. Enforcement of tribal taxes due by non-Indians thereafter depended on the Interior Department for the brief period until taxing power was itself terminated in 1906 (Act of Apr. 26, 1906, ch. 1876, § 1, 34 Stat. 137). See, *e.g.*, *Morris* v. *Hitchcock*, 194 U.S. 384 (1904). But this exceptional situation, created by special legislation aimed at particular Tribes, indicates what otherwise would be the rule: civil judicial power reaching non-Indians to the same extent as the Tribe's legislation may. Before the Act of May 2, 1890, the civil jurisdiction of the Cherokee courts expressly covered not only cases in which members were the only parties, but also "where the cause of action shall arise in the Cherokee nation." Treaty of July 19, 1866, art. 13, 14 Stat. 803. See *In re Mayfield*, 141 U.S. 107, 113-115 (1891); *Alberty* v. *United States*, 162 U.S. 499, 502-503 (1896).

> integral parts of an Indian government was stunted by a lack of effective programs or funding, as well as policy vacillations. * * *

Today, however, the situation is very different. One survey indicated that no less than 66 Tribes expressly assert civil court jurisdiction over non-Indians in some circumstances. NAICJA Report, *Native American Tribal Court Profiles, 1984*, at 4, 5, 6, 7, 10, 11, 14, 15, 19, 21, 22, 23, 25, 30, 32, 40, 42, 44, 51, 53, 54, 56, 57, 62, 66, 70, 73, 76, 78, 80, 81, 82, 85, 86, 87, 88, 89, 90, 91, 92, 96, 97, 98, 100, 101, 104, 105, 106, 107, 110, 112, 113, 114, 115, 118, 119, 121, 124, 125, 126, 127, 128, 134, 136, 137, 143. The Department of the Interior has approved such provisions[7] and, at least in some contexts, so have the courts. *E.g.*, *Cowan* v. *Rosebud Sioux Tribe*, 404 F. Supp. 1338 (D.S.D. 1975); *Cardin* v. *De La Cruz*, 671 F.2d 363 (9th Cir. 1982), cert. denied, 459 U.S. 967; *Babbitt Ford, Inc.* v. *Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983), cert. denied, No. 83-610 (Apr. 2, 1984). Indeed, this Court's ruling in *Williams* v. *Lee*, *supra*, and its progeny strongly indicates that a non-Indian whose conduct directly affects tribal members may be

[7] Among tribal laws approved in the last decade by the Department which assert tribal court civil jurisdiction over non-Indians are constitutions, codes or ordinances of the Pueblo of Laguna, the Yerington Paiute Tribe, the Ute Tribe, the White Mountain Apache Tribe, the Gila River Indian Community, the Keweenaw Bay Indian Community, the Bay Mills Chippewa Tribe, the Confederated Tribes of the Warm Springs Reservation, the Makah Tribe, the Port Gamble Klallam Tribe, the Quileute Tribe, the Nez Perce Tribe, the Mescalero Apache Tribe, the Rosebud Sioux Tribe, the Crow Creek Tribe, the Fort Peck Assiniboine and Sioux Tribes, the Fort Belnap Gros Ventre and Assiniboine Tribe, the Salt River Pima and Maricopa Tribes and the Devils Lake Sioux Tribe.

required to answer in tribal court in respect of a Reservation-based civil claim. After all, it would be anomalous to excuse non-members from appearing in tribal court when the same persons, as plaintiffs, are compelled to invoke that tribunal to seek judicial redress.[8] That appears to be the Court's teaching in stating, without distinction between plaintiff and defendant, that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. at 65 (footnote omitted).[9]

---

[8] Of course, this symmetry cannot be extended to *in personam* jurisdiction. A defendant can object, on Due Process grounds, to a plaintiff's choice of a state forum if requisite "minimum contacts" are lacking, notwithstanding the forum's power, in the abstract, to adjudicate the claim. *E.g., Helicopteros Nacionales de Colombia* v. *Hall*, No. 82-1127 (Apr. 24, 1984); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980). We assume that similar limitations apply to tribal forums. But there is no assertion in this case that the relationship between the defendant, the forum, and the litigation is so tenuous that tribal court jurisdiction would offend "traditional notions of fair play and substantial justice." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945).

[9] Indeed, the district court below recognized the contradiction and sought to avoid it by suggesting that *Williams* v. *Lee* effectively has been overruled by *Montana* v. *United States*. Pet. App. 23a-24a. As this Court well knows, that is hardly the case. See, *e.g., Three Affiliated Tribes* v. *Wold Engineering*, No. 82-629 (May 29, 1984), slip op. 8-9. If anything, it is the *Montana* decision that has been narrowed. See, *e.g., New Mexico* v. *Mescalero Apache Tribe*, slip op. 7 n.12.

6. We find particularly strained the suggestion that the dictum from the *Montana* case just quoted permits tribal exercise of jurisdiction over non-Indians on the Reservation when the conduct in question directly affects the "health or welfare" of the *Tribe* itself, but denies jurisdiction when the *members* are adversely affected. One need only posit a case of tortious damage to tribal property—instead of personal injury to a member—and ask whether the non-Indian tortfeasor would then be answerable in tribal court. Surely, a rampant public nuisance located on the Reservation is not less subject to tribal jurisdiction because the resulting harm is to the tribal population rather than the tribal land. Cf. *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 179, 180-181 (1973).

It may be debatable whether tribal courts can compel a non-Indian motorist travelling through the Reservation to answer for an isolated tort affecting only a single individual who happens to be an Indian. But there is no basis for denying the Tribe and its institutions power to deal with a situation like that alleged here—maintaining a dangerous condition that potentially threatens the entire student body of a Reservation school, 85% of whom are tribal members. The standard, we submit, is whether the conduct underlying the lawsuit significantly affects the tribal community. On the face of the complaint here, this is such a case.

CONCLUSION

The judgment of the court of appeals vacating the injunction entered by the district court should be affirmed.

Respectfully submitted.

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FEBRUARY 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10171

(20)

No. 84-320

Office - Supreme Court, U.S.
FILED
FEB 19 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES, et al.,

Petitioners,

v.

CROW TRIBE OF INDIANS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[redacted]**D BRIEF OF AMICI CURIAE, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY AND GILA RIVER INDIAN COMMUNITY IN SUPPORT OF THE RESPONDENTS**

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MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

The Salt River Pima-Maricopa Indian Community and the Gila River Indian Community hereby move for leave to file an amici curiae brief in support of the Respondents, Crow Tribe of Indians, et al., in the instant case. The proposed brief accompanies this motion. Amici have received the consent of the Petitioner herein, National Farmers Union Insurance Companies. The Respondent Crow Tribe of Indians was not represented by counsel at the time this motion and brief were written, and therefore consent of the Respondents has not been obtained.

Amici, who are Indian communities located in Arizona, are interested in the outcome of this case because of the potential effect of this decision on jurisdiction within Indian country. Amici have a particular interest in the jurisdiction of their tribal courts because virtually all of the land within its borders is allotted or tribal land.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. RECOGNITION IN THIS CASE OF A CIVIL CAUSE OF ACTION ARISING UNDER FEDERAL COMMON LAW WOULD BE CONTRARY TÓ CONGRESSIONAL INTENT	5
II. TRIBAL REMEDIES ARE EXCLUSIVE ON THE FACTS OF THE INSTANT CASE: INTERVENTION BY THE FEDERAL COURT IS UNWARRANTED	7
CONCLUSION	9

TABLE OF AUTHORITIES

CASES:	*Page*
Ashcroft v. United States Department of the Interior, 679 F.2d 196 (9th Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983)	7-8
Babbitt Ford, Inc. v. The Navajo Tribe, 710 F.2d 587 (9th Cir. 1983), *cert. denied*, _____ U.S. _____, 104 S.Ct. 1707 (1984)	7
Cardin v. De La Cruz, 671 F.2d 363 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982)	8
Fisher v. District Court, 424 U.S. 382 (1976)	7
Illinois v. City of Milwaukee, 406 U.S. 91 (1972)	6
Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304 (1816)	6
Montana v. United States, 450 U.S. 44 (1981)	6, 7
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)	8
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)	5-6
Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe, 634 F.2d 474 (9th Cir. 1980)	5
Webb v. Webb, 451 U.S. 493 (1981)	8
Williams v. Lee, 358 U.S. 217 (1959)	7, 8
Younger v. Harris, 401 U.S. 37 (1971)	8
CONSTITUTIONAL PROVISIONS AND STATUTES:	
Fourteenth Amendment	5
25 U.S.C. §§ 1301 et seq.	5-6

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INTEREST OF AMICI CURIAE

The Salt River Pima-Maricopa Indian Community and the Gila River Indian Community are participating as amici curiae because of the substantial impact that a reversal or modification of the decision below would have upon these Indian tribes and their people. Each of these Indian tribes is organized under Section 16 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 987, 25 U.S.C. § 476.

The Salt River Pima-Maricopa Indian Community and the Gila River Indian Community maintain sophisticated governmental systems including court systems that deal with

civil and criminal matters. It is of the gravest importance to these communities that the legitimacy of their governance of affairs within their reservations ought not to be open to question.

A. THE INTEREST OF THE SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY

The Salt River Pima-Maricopa Indian Community is composed of 4087 Indian people who trace their ancestry in the Salt River Valley back to 300 B.C. In 1879 the Reservation for the Salt River Pima-Maricopa Indians was established by Executive Order, and since 1940 tribal government has been conducted pursuant to the Indian Reorganization Act of 1934.

The Salt River Community consists of 52,729 acres of land in allotted or tribal status (except for 25.27 acres about which arrangements have been made to return the land to Indian ownership). Despite its location within the Phoenix metropolitan area, the Salt River Pima-Maricopa Indian Community has managed to preserve its land base with almost no fee lands within its borders. It is the firm policy of the Community to maintain this status containing within Community lands the economic development occurring on the areas of the Community that abut the Phoenix metropolitan area.

Scottsdale Community College is located just within the Community near its western boundary. Non-Indians from neighboring cities constitute the great majority of the students. Various businesses owned by non-Indians are located on leased allotted and tribal land. Approximately one-half of the arable land within the Community is under cultivation with the majority of the cultivated land leased to non-Indians. Such activity is a source of income for the Community as well as individual allottees.

Although the Salt River Pima-Maricopa Indian Community has kept the non-Indian population within the Community to a transitory minimum, it has never been possible for the Community to ignore the non-Indian population on all sides.

The Salt River Pima-Maricopa Indian Community has enacted ordinances that assert civil jurisdiction over non-Indians who have entered into consensual relationships with the Community or its members through commercial dealings or otherwise cause an actionable event to occur within the Community. These jurisdictional ordinances are an integral part of successful relationships between the Community and its members and the non-Indians who come upon the Community lands.

B. THE INTEREST OF THE GILA RIVER INDIAN COMMUNITY

The Gila River Indian Reservation encompasses approximately 372,000 acres and is located in the south central Arizona counties of Pinal and Maricopa just north of the City of Phoenix. The Community is inhabited by two Indian tribes, the Pimas and Maricopas, with a total population of approximately 7,000. Pimas have lived in the same geographical area for over two thousand years. Most of the 300 non-Indians living within the external boundaries of the reservation are employees of the Bureau of Indian Affairs or the Indian Health Service.

The interstate highway which links Phoenix and Tucson intersects the Gila River Indian Reservation. Large numbers of non-Indians cross the reservation, work on its farms and industrial plants, and visit its recreational areas. There are approximately thirty-two non-Indian owned businesses on the reservation employing approximately 650 persons of whom approximately half are non-Indians.

The Pima and Maricopa people of the Gila River Indian Community have historically been an agricultural people. Using their limited water resources, they have developed a substantial tribal farm. Additionally, land has been leased to non-Indians for farming purposes. The Community has developed three industrial parks. Major recreation areas have been developed to the southeast of Phoenix, and a museum,

arts and crafts center and restaurant lie off the main interstate highway near Sacaton.

The Pima and Maricopa Indians of the Community, who have since time immemorial maintained a system of self-government, organized and incorporated as the Gila River Indian Community pursuant to the Indian Reorganization Act of 1934. The constitution enables the Community to enact ordinances which apply to Indians and non-Indians alike.

As a consequence of the close proximity to the large urban non-Indian population and the interaction engendered thereby, the number of civil filings in the Community court involving transactions between Indians and non-Indians is large. The Community Law and Order Code provisions applicable to non-Indians include those relating to marriage and divorce, child custody, business licenses, taxes on the transaction of business, sale of liquor, control of livestock, building codes and control of cotton pests and use and sale of fertilizers and animal feed.

The ordinances of the Gila River Indian Community which apply to all persons within the territory of the Gila River Indian Reservation recognize the basic understanding of the people of the Gila River Indian Community that all persons within the external boundaries of the reservation ought to be dealt with by the same standard of law and protected by the same principles of justice. Within the cloak of the Indian Civil Rights Act of 1968 and the Constitution of the Gila River Indian Community, the ordinances of the Gila River Indian Community are designed to accord such fair and equal treatment to all people.

SUMMARY OF ARGUMENT

The courts of the Salt River Pima-Maricopa Indian Community and the Gila River Indian Community, as well as other Indian communities, have retained inherent sovereignty to exercise civil jurisdiction over civil disputes including non-Indians on the reservation. Federal case law does not restrict Indian tribal courts from asserting civil jurisdiction over non-Indians whose activities within the tribal reservation concerning Indian tribes or tribal members even on fee lands within the reservation cause some actionable event to occur. In cases involving the adjudication of such private disputes no federal common law exists which supports district court federal question jurisdiction. Principles of comity require that great restraint be exercised by the federal courts before permissible intervention.

ARGUMENT

I. RECOGNITION IN THIS CASE OF A CIVIL CAUSE OF ACTION ARISING UNDER FEDERAL COMMON LAW WOULD BE CONTRARY TO CONGRESSIONAL INTENT

Indian tribes are not constrained by the provisions of the Fourteenth Amendment of the United States Constitution (*See Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474 (9th Cir. 1980)). The Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq.*, however, requires tribal courts to follow due process and equal protection guidelines in exercising their jurisdiction. Congress addressed the issue of federal court interference with tribal court proceedings in this Act and limited review by the federal court to petitions for habeas corpus. Petitioner is asking that this Court expand this sole and exclusive remedy without any statutory authority or federal case law to support such a determination.

In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), this Court refused to imply a federal remedy in addition to habeas corpus. The *Martinez* Court recognized major congressional purposes behind the Act to be the protection of tribal sovereignty from undue interference (*Id.* at 63) and strengthening tribal courts (*Id.* at 64) as well as protection of individual rights. Judicial expansion of the exclusive remedy allowed in the Act was not, however, mandated by recognition of dual congressional objectives.

> Where Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesi-

tant to infer from its silence a cause of action that, while serving one legislative purpose, will disserve the other. Creation of a federal cause of action for the enforcement of rights created in Title I, however useful it might be in securing compliance with § 1302, plainly would be at odds with the congressional goal of protecting tribal self-government. *Id.*

Martinez established that under the statutory scheme and legislative history of the Indian Civil Rights Act, Congress' failure to provide remedies other than habeas corpus was deliberate and that a "judicially sanctioned intrusion into tribal sovereignty" would not be required to accomplish the Act's purposes (*Id.* at 61) (cf. *Illinois v. City of Milwaukee*, 406 U.S. 91, 104 (1972) where this Court found that application of federal common law to abate a public nuisance in interstate waters *was consistent* with the Water Pollution Control Act). There is no federal common law to support federal question jurisdiction over a claim of abuse of tribal adjudicatory jurisdiction.

Nor does *Montana v. United States*, 450 U.S. 44 (1981) state a rule of federal common law that would assist petitioner in finding jurisdiction in the District Court. *Montana* dealt only with the jurisdiction of a tribe to regulate activities within a reservation and the Court determined that as to the regulatory powers of the Crow Tribe, different standards apply to the activities of non-Indians depending upon whether the activities occurred on tribal or fee land. There is no tribal regulation here as to which enforcement is sought. A private action is being adjudicated in the court of the locality, the Crow Tribal Court, and as to the exercise of the jurisdiction of that court for such a purpose, there is no federal common law, and so there is no jurisdiction in the Federal District Court to intervene. [1]

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[1] The construction based on *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816) falls of its own weight when as here there is no federal question raised. It is thus not necessary to go to a federal forum, nor permissible.

II. TRIBAL REMEDIES ARE EXCLUSIVE IN THE FACTS OF THE INSTANT CASE; INTERVENTION BY THE FEDERAL COURT IS UNWARRANTED

In *Williams v. Lee*, 358 U.S. 217 (1959) this Court held that exclusive jurisdiction was in the tribal court for a non-Indian merchant who conducted business on the reservation and who was attempting to collect a debt from a reservation Indian. In *Fisher v. District Court*, 424 U.S. 382 (1976) this Court held that a state court did not have jurisdiction over an adoption proceeding involving tribal members who resided on the Northern Cheyenne Reservation, explaining: "The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law . . ." *Id.* at 390.

As the United States Supreme Court observed in *Montana v. United States*, 450 U.S. 544 (1981), Indian tribes "retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Id.* at 565. Commercial dealing, contracts, leases or other arrangements are the activities that form the basis of the tribe's regulatory power. *Id.* In addition the *Montana* Court recognized tribes may have inherently retained civil authority over non-Indians' conduct on fee lands within the reservation when such conduct affects the political integrity, economic security or tribal health or welfare. *Id.* at 566. Jurisdiction in tribal court over non-Indian defendants has been recognized in other regulatory contexts: *Babbitt Ford, Inc. v. The Navajo Tribe*, 710 F.2d 587 (9th Cir. 1983), *cert. denied*, _____ U.S. _____, 104 S.Ct. 1707 (1984) (tribe may exercise civil jurisdiction over non-Indians conducting an automobile repossession on reservation; federal question jurisdiction based on the extent to which treaties and federal case law divest the Navajo Tribe of power to exercise civil jurisdiction over non-Indians conducting repossessions on reservation land); *Ashcroft v. United States Department of the Interior*, 679 F.2d 196 (9th Cir. 1982),

cert. denied, 459 U.S. 1201 (1983) (businesses conducted on non-Indian fee lands within the exterior boundaries of the Navajo reservation subject to regulations enacted by the Secretary of the Interior pursuant to Indian traders statutes; federal question jurisdiction based on Indian trader statutes); and *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir.), *cert. denied*, 459 U.S. 976 (1982) (tribe had the power to enforce its building, safety and health regulations against non-Indian operator of a store on fee land on reservation; federal question jurisdiction based on federal common law on regulatory jurisdiction drawn from *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

Only when "absolutely necessary for protection of constitutional rights" (*Younger v. Harris*, 401 U.S. 37, 45 (1971)), do federal courts interfere in pending state court proceedings. Petitioners have tribal court remedies available to them, and they have not chosen to avail themselves of those remedies. Intervention by the federal court at this point in the proceedings would be analogous to federal court intervention in state court proceedings. As a matter of comity such intervention has, with the *Younger v. Harris*, *supra*, exception noted above, not been sanctioned. See *Webb v. Webb*, 451 U.S. 493 (1981).

The principles behind federal court restraint apply with equal force to tribal court proceedings and mandate that the Crow Tribal Court be allowed to have the opportunity to resolve a dispute that it clearly has jurisdiction over and to preserve the "right of reservation Indians to govern themselves." *Williams v. Lee*, 358 U.S. 217, 223 (1959). There has been no showing by petitioner that the great and immediate irreparable injury required by *Younger v. Harris*, *supra*, is present to require federal intervention, if intervention is permissible at all.

CONCLUSION

Absent settled federal common law, federal question jurisdiction can be based only on such "... laws ... of the United States" as have been enacted in statutes of the United States. It is not for the Court to conjecture as to what statutes Congress would enact had Congress concerned itself with the questions of tribal court civil jurisdiction over private tort litigation. It is solely within the power of Congress to create federal Indian policy and to direct the manner of its enforcement. The judgment of the circuit court ought to be affirmed.

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February 15, 1985

No. 84-320

Office - Supreme Court, U.S.
FILED
FEB 19 1985
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

[redacted]

BRIEF *AMICI CURIAE* OF THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, CHEYENNE RIVER SIOUX TRIBE, DEVILS LAKE SIOUX TRIBE, MESCALERO APACHE TRIBE, NEZ PERCE TRIBE, PUEBLO OF LAGUNA, SENECA NATION OF INDIANS, STANDING ROCK SIOUX TRIBE, AMERICAN INDIAN LAWYER TRAINING PROGRAM, INC., ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, NATIONAL INDIAN JUSTICE CENTER AND NORTHWEST INTERTRIBAL COURT ASSOCIATION

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-320

NATIONAL FARMERS UNION INSURANCE COMPANIES, *et al.*

v.

CROW TRIBE OF INDIANS, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, CHEYENNE RIVER SIOUX TRIBE, DEVILS LAKE SIOUX TRIBE, MESCALERO APACHE TRIBE, NEZ PERCE TRIBE, PUEBLO OF LAGUNA, SENECA NATION OF INDIANS, STANDING ROCK SIOUX TRIBE, AMERICAN INDIAN LAWYER TRAINING PROGRAM, INC., ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, NATIONAL INDIAN JUSTICE CENTER AND NORTHWEST INTERTRIBAL COURT ASSOCIATION

Pursuant to Rule 36.3, the above-named Indian tribal governments and Indian-interest organizations move for leave to file this brief *amici curiae* in the above-captioned case. Respondents Leroy Sage and Flora Not Afraid have consented in writing to the filing of this brief. Petitioners have been asked for consent, but as of this writing have not given written consent. Respondents Crow Tribe

and Crow Tribal officials are without counsel at this time and, therefore, have not given their consent.

INTEREST OF *AMICI CURIAE*

Amici Assiniboine and Sioux Tribes of the Fort Peck Reservation, Cheyenne River Sioux Tribe, Devils Lake Sioux Tribe, Mescalero Apache Tribe, Nez Perce Tribe, Pueblo of Laguna, Seneca Nation of Indians and Standing Rock Sioux Tribe all are federally-recognized Indian tribes. Each has a well-organized legal system and each asserts civil jurisdiction over non-Indians in some cases. The outcome of this case may directly affect the permissible scope of the civil jurisdiction of *amici's* courts and the extent to which federal courts intrude into the functioning of those courts.

The National American Indian Court Judges Association is an organization of 250 tribal judges representing 149 tribal courts across the country. The Northwest Intertribal Court Association is the tribal court system for thirteen tribes in the State of Washington. The American Indian Lawyer Training Program, Inc., and the National Indian Justice Center are non-profit corporations. These organizations are devoted to the improvement and strengthening of tribal justice systems and the protection of tribal jurisdiction.

The Association on American Indian Affairs, Inc., is a nonprofit membership corporation organized under the laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians. The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of briefs *amicus curiae* with this Court.

The issues in this case present broad questions regarding the scope of tribal civil authority over non-Indians and the power of federal courts to impede tribal action.

In order to facilitate this Court's consideration of the legal and policy implications of this case, *amici* will show that: (1) Indian tribal courts generally have jurisdiction to adjudicate the liability of non-Indians for acts affecting Indians and occurring on a reservation; and (2) if federal courts in fact have jurisdiction over actions challenging tribal civil adjudicatory authority, such jurisdiction should be exercised only if the persons challenging tribal authority have exhausted their remedies under tribal law.

Amici are concerned that these issues will not be addressed adequately by the parties for two reasons. First, the parties seek a specific result in this case while *amici* are more concerned with the broader implications of the Court's decision and its effect upon them. Second, respondent Crow Tribe currently is without counsel and the interests of tribal governments may not be presented to the Court. Wherefore, *amici* request that their motion for leave to file the attached brief *amici curiae* be granted.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	
I. The Crow Tribal Court may assert jurisdiction over civil actions arising on the Reservation brought by tribal members against non-members absent any express limitation in federal statutory law or tribal law	5
A. The decisions of this Court and other courts have recognized consistently the power of Indian governments to adjudicate personal and property rights of non-Indians	5
B. The limitation on tribal power recognized in *Oliphant* v. *Suquamish Indian Tribe*, analyzed in light of the interests protected by it and its historical evolution, does not apply to tribal civil adjudicatory jurisdiction	8
C. The District Court plainly erred in holding that *Montana* v. *United States* forecloses the exercise of tribal jurisdiction in this case	15
D. Tribal jurisdiction over the School District is not barred by sovereign immunity	18
II. Assuming that federal courts have jurisdiction over such matters, out of respect for tribal processes and prerogatives, and in order that wasteful and unnecessary litigation be avoided, federal courts should abstain from hearing cases brought by non-Indian challengers until tribal remedies have been exhausted	19

TABLE OF CONTENTS—Continued

	Page
A. Traditional concerns regarding comity and solicitude for tribal self-government require that tribal courts have the first opportunity to resolve questions as to their jurisdiction..	19
B. The conduct of the petitioners in this matter exemplifies the unhappy consequences following from the absence of a requirement that challengers of tribal jurisdiction first exhaust their tribal remedies	23
III. Tribal courts are modern judicial tribunals applying familiar rules of law and procedure and wholly capable of applying the complex federal law regarding tribal jurisdiction	25
CONCLUSION	29

TABLE OF AUTHORITIES

CASES:	Page
Babbitt Ford, Inc. v. *Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983), *cert. den.*, —— U.S. ——, 104 S.Ct. 1707 (1984)	7, 17
Blackfeet Tribal Business Council v. *East Glacier Water & Sewer Dist.*, 11 Indian L. Rep. 6021 (Blackfeet Tr. Ct. 1984)	26
Brunette v. *Dann*, 417 F. Supp. 1382 (D. Idaho 1976)	21
Buster v. *Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906)	15
Cardin v. *De La Cruz*, 671 F.2d 363 (9th Cir.), *cert. den.*, 459 U.S. 967 (1982)	7
Conroy v. *Frizzell*, 429 F. Supp. 918 (D.S.D. 1977)	21
Cowan v. *Rosebud Sioux Tribe*, 404 F. Supp. 1338 (D.S.D. 1975)	11
Crow Creek Sioux Tribe v. *Buum*, 10 Indian L. Rep. 6031 (Intertribal Ct. App. 1983)	25
Edelman v. *Jordan*, 415 U.S. 651 (1974)	19
Ex Parte Crow Dog, 109 U.S. 556 (1883)	6, 14
Fisher v. *District Court*, 424 U.S. 382 (1976)	17, 24, 25
Howlett v. *Salish & Kootenai Tribes*, 529 F.2d 233 (9th Cir. 1976)	20
Janis v. *Wilson*, 521 F 2d 724 (8th Cir. 1975)	20
Kennerly v. *District Court*, 400 U.S. 423 (1971)	*passim*
Knight v. *Shoshone & Arapahoe Indian Tribes*, 670 F.2d 900 (10th Cir. 1982)	7
McClanahan v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973)	16
McCurdy v. *Steele*, 506 F.2d 653 (10th Cir. 1974)	21
Merrion v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982)	6, 7
Mescalero Apache Tribe v. *Jones*, 411 U.S. 145 (1973)	18
Middlesex County Ethics Comm. v. *Garden State Bar Ass'n*, 457 U.S. 423 (1982)	22
Montana v. *Peretti*, 661 F.2d 756 (9th Cir. 1981)	19
Montana v. *United States*, 450 U.S. 544 (1981)	6, 8, 11, 15, 16
Morris v. *Hitchcock*, 194 U.S. 384 (1904)	15

TABLE OF AUTHORITIES—Continued

	Page
Morton v. *Mancari*, 417 U.S. 535 (1974)	21
National Farmers Union Ins. Co. v. *Crow Tribe*, 560 F. Supp. 213 (D. Mont. 1983)	16
National Farmers Union Ins. Co. v. Crow Tribe, 736 F.2d 1320 (9th Cir. 1984)	19
Nevada v. *Hall*, 440 U.S. 410 (1979)	18
New Mexico v. *Mescalero Apache Tribe*, 462 U.S. 324, 103 S.Ct. 2378 (1983)	8
North Dakota ex rel. Wefald v. *Kelly*, 10 L. Rep. 6059 (Standing Rock Sx. Tr. Ct. 1983)	25
Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978)	*passim*
Rosebud Sioux Tribe v. *Driving Hawk*, 534 F.2d 98 (8th Cir. 1976)	20
Runs After v. *Cheyenne River Sioux Tribe*, 437 F. Supp. 1035 (D.S.D. 1977)	21
Sage v. *Lodge Grass School Dist.*, 10 Indian L. Rep. 6019 (Crow Tr. Ct. 1982)	14
Santa Clara Pueblo v. *Martinez*, 436 U.S. 49 (1978)	*passim*
Three Affiliated Tribes of the Ft. Berthold Reservation v. *Wold Engineering*, —— U.S. ——, 104 S.Ct. 2267 (1984)	6, 8
Tom v. *Sutton*, 533 F.2d 1101 (9th Cir. 1976)	21
United States v. *Mazurie*, 419 U.S. 544 (1975)	7
United States v. *United Mine Workers*, 330 U.S. 258 (1947)	21
United States ex rel. Rollingson v. *Blackfeet Tribe*, 244 F. Supp. 474 (D. Mont. 1965)	26
Washington v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980)	*passim*
Wickard v. *Filburn*, 317 U.S. 111 (1942)	17
Williams v. *Lee*, 358 U.S. 217 (1959)	*passim*

STATUTES:

Anti-Injunction Act, 28 U.S.C. § 2283 (1982)	23
Comprehensive Code of Justice of the Assiniboine and Sioux Tribes	2, 28

TABLE OF AUTHORITIES—Continued

	Page
Crow Allotment Act of 1920, 41 Stat. 751	18
Crow Rules of Civil Procedure	24, 27
Crow Treaty of May 7, 1868, 15 Stat. 667	13
Devils Lake Sioux Tribe Law and Order Code, Chapter I, Title B, § 104(2)(a)	2, 27
Fed. R. Civ. P. 1	27
Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1982)	20, 23
Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, 88 Stat. 2203 (1975)	21
Montana Code Ann. § 2-9-311 (1983)	19
Montana Const., Art. II, § 18	18
Navajo Treaty of June 1, 1868, 15 Stat. 667	13
Sioux Treaty of April 28, 1868, 15 Stat. 635	13
Standing Rock Sioux Tribe Code of Justice	2, 27

ADMINISTRATIVE MATERIALS:

25 C.F.R. § 11.23(c) (1984)	27
55 I.D. 14 (1934)	7, 9, 15
7 Op. Atty. Gen. 174 (1885)	9, 10
23 Op. Atty. Gen. 214 (1900)	15

MISCELLANEOUS:

Cohen, F., *Handbook of Federal Indian Law* (1942)	7, 12
Cohen, F., *Handbook of Federal Indian Law* (1982 Ed.)	*passim*
Indian Self-Determination and the Role of Tribal Court 11-60 (American Indian Lawyer Training Program 1977)	12
Note, *Conflict of Laws and the Indian Reservation*, 8 Am. Indian L. Rev. 361 (1981)	14
Restatement (Second) *Conflicts of Laws 2d* § 6 (1971)	14
Wright, *Law of Federal Courts* § 16 (1976)	21

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Pursuant to Rule 36.3, the above-named Indian tribal governments and Indian-interest organizations file this brief *amici curiae* in support of the respondents in the above-captioned case.

INTEREST OF *AMICI CURIAE*

Amici Assiniboine and Sioux Tribes of the Fort Peck Reservation, Cheyenne River Sioux Tribe, Devils Lake Sioux Tribe, Mescalero Apache Tribe, Nez Perce Tribe, Pueblo of Laguna, Seneca Nation of Indians, and Standing Rock Sioux Tribe are all federally recognized Indian tribes, with tribal governments recognized by the Secretary of the Interior. Each has a well-organized legal system, including tribal courts.[1] Each asserts civil jurisdiction over non-Indians in some cases.[2] The outcome of this case may directly affect the permissible scope of the civil jurisdiction of *amici*'s courts. It may also affect the extent to which federal courts intrude into the functioning of those courts. Thus, *amici* have a direct interest in the outcome of this case.

The National American Indian Court Judges Association is an organization of 250 tribal judges representing 149 tribal courts across the country. The Northwest Intertribal Court Association is the tribal court system for thirteen tribes in the State of Washington. These organizations are devoted to the improvement and strengthening of tribal courts, judges and procedures, and the protection of tribal court jurisdiction. Between them, they represent the vast majority of all operating Indian tribal court systems.

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[1] Two of the Tribes have recently adopted comprehensive revisions of their Codes of Justice, the Standing Rock Tribe in 1981 and the Assiniboine and Sioux Tribes in 1985. A third, the Cheyenne River Sioux Tribe, currently is engaged in a revision of its code as well.

[2] *E.g.*, Comprehensive Code of Justice of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Title I, Sec. 107; Standing Rock Sioux Tribe Code of Justice, Title I, Sec. 1-107; Devils Lake Sioux Tribe Law and Order Code, Chapter I, Sec. 102(3).

The American Indian Lawyer Training Program, Inc., and the National Indian Justice Center are non-profit corporations. These organizations are devoted to the improvement and strengthening of tribal justice systems. To this end, they offer a variety of training programs for tribal court judges, advocates and lay personnel.

The Association on American Indian Affairs, Inc., is a nonprofit membership corporation organized under the laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians. The Association is the largest Indian-interest organization in the United States, and is nation-wide in scope, with a membership of 50,000 that consists of both Indians and non-Indians. The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of briefs *amicus curiae* with this Court.

The issues in this case present broad questions regarding the scope of tribal civil authority over non-Indians and the power of federal courts to impede tribal action. In order to facilitate this Court's consideration of the legal and policy implications of this case, *amici* will address only some of the several issues implicit in the questions as to which *certiorari* was granted. Specifically, *amici* will show that: (1) Indian tribal courts generally have jurisdiction to adjudicate the liability of non-Indians for conduct affecting Indians and occurring on a reservation; (2) tribal jurisdiction over the School District is not barred by sovereign immunity; (3) if federal courts in fact have jurisdiction over actions challenging tribal civil adjudicatory authority, such jurisdiction should be exercised only if the persons challenging tribal authority have exhausted their remedies under tribal law; and (4) Indian tribal courts are modern tribunals employing rules of law and procedure familiar to all.

SUMMARY OF ARGUMENT

The decisions of this Court have established beyond peradventure that Indian tribes have the power of civil adjudication in disputes involving Indians and non-Indians arising in Indian Country. This Court also has recognized tribal regulatory power over non-Indians—a power which must involve the adjudicatory power to enforce those regulations. Tribal civil jurisdiction is not divested by constraints implicit in the tribes' status as domestic dependent sovereigns. The Executive Branch and the Congress have joined the federal courts in acting consistently on the assumption that the tribes retain such jurisdiction.

In the case of negligent acts causing personal injury to tribal members, the health and welfare of the tribe clearly are at stake, and the tribe, therefore, has jurisdiction to adjudicate civil liability flowing from that conduct. In this regard, the tribe represents its members collectively. If non-Indian conduct affecting one tribal member is one instance of a larger class of conduct that threatens the health and welfare of tribal members, the tribe has jurisdiction to regulate, and to adjudicate liability arising from, that conduct.

Sovereign immunity does not bar the action in Crow Tribal Court. Just as a tribe is subject to state jurisdiction for its off-reservation activities, so too is a state subject to tribal jurisdiction for its on-reservation activities. Moreover, Montana has waived its immunity from suit for local governmental entities.

Assuming that federal court jurisdiction exists to hear challenges to tribal civil adjudicatory jurisdiction, that authority should be exercised only where necessary. Considerations of comity, judicial restraint and judicial economy support a requirement that non-Indians challenging tribal jurisdiction first litigate the question in tribal forums. This case exemplifies the unhappy consequences that result when exhaustion is not required.

These Indian forums, at the urging and with the assistance of the United States, have evolved as modern, competent judicial tribunals. They have shown their facility for analyzing jurisdictional issues of the type presented here. Their rules of law and procedure are fair, reasonable and familiar. Respect for tribal court processes and prerogatives supports a requirement of federal abstention until tribal courts have expressed their views on such jurisdictional issues.

ARGUMENT

I. The Crow Tribal Court may assert jurisdiction over civil actions arising on the Reservation brought by tribal members against non-members absent any express limitation in federal statutory law or tribal law.

A. The decisions of this Court and other courts have recognized consistently the power of Indian governments to adjudicate personal and property rights of non-Indians.

That Indian tribal courts have jurisdiction to adjudicate civil claims arising on the reservation and involving both Indian and non-Indian parties must be regarded as beyond doubt. This conclusion follows inevitably from previous decisions of this Court and other courts recognizing the power of tribal courts to adjudicate such controversies.

In *Willams* v. *Lee*, 358 U.S. 217 (1959), this Court held that tribal jurisdiction over a contract dispute between a non-Indian plaintiff and an Indian defendant was exclusive of state jurisdiction. The non-Indian plaintiff's right of action, therefore, was governed by tribal law and cognizable only in tribal court. The same result was reached in *Kennerly* v. *District Court*, 400 U.S. 423 (1971), despite the existence of a tribal resolution pur-

porting to grant concurrent jurisdiction over civil suits involving tribal members to the State of Montana.[3]

The results in *Williams* and *Kennerly* were grounded, of course, in the long-standing rule that, on their reservations, Indians and their conduct are to be judged by the rules and standards they have established for themselves. *Williams, supra*, 358 U.S. at 223; *Ex Parte Crow Dog*, 109 U.S. 556, 571 (1883). This rule does not define limitations on tribal power but, rather, defines the subject matters as to which tribal authority is exclusive and the states have no power to act absent a grant of authority from Congress. The scope of tribal power consistently has been recognized to extend far beyond merely regulating the conduct of its members. Indeed, Indian tribes may regulate non-Indian conduct, thereby affecting important personal and property rights of non-Indians, in a variety of ways.

In *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982), for example, the Court held that a tribe may tax non-Indians who conduct business on the reservation, and that the power to tax "is an inherent power necessary to tribal self-government and territorial management." In *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-153 (1980), the Court noted that the power to tax non-Indians "is a fundamental attribute of sovereignty. . . ." In *Montana* v. *United States*, 450 U.S. 544, 565 (1981), the Court stated that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. *See also Williams* v. *Lee, supra*; *Kennerly* v. *District Court*,

[3] That jurisdiction, while exclusive when the defendant is a tribal member, is shared with the state when an Indian plaintiff sues a non-Indian. *Cf.*, Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, —— U.S. ——, 104 S.Ct. 2267 (1984).

supra; *United States* v. *Mazurie*, 419 U.S. 544, 557-558 (1975).[4]

In recognizing the power of Indian tribes to regulate by civil law non-Indian conduct on the reservation, the courts implicitly have recognized tribal power to adjudicate disputes arising from the application of these regulations. Tribal power to tax, zone and otherwise regulate would be empty indeed if the tribes lack the power to adjudicate the civil liability of persons subject to such regulations for failure to abide by them. The tribes, therefore, clearly may adjudicate the civil liability of non-members for violations of tribal regulations. *See Babbit Ford, Inc.* v. *Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983) (Tribal law providing for liquidated damages against violators of tribal repossession law held valid as applied to non-Indians).[5]

Neither law nor history admit of any exemption for non-Indians from tribal civil judicial power. The petitioners cannot deny that tribal courts have jurisdiction over civil claims arising on the reservation by non-Indians against Indians. *Williams* and *Kennerly* foreclose such an argument. The rule should be no different when the non-Indian is the defendant. The anomaly of requiring

[4] The lower federal courts show a similar understanding of tribal civil authority over non-Indians. *E.g.*, Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983) (ordinance governing self-help repossessions); Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982) (building, health and safety regulations); Knight v. Shoshone & Arapaho Tribes, 670 F.2d 900 (10th Cir. 1982) (zoning ordinance).

[5] This rule also was recognized by the Solicitor of the Department of the Interior in *Powers of Indian Tribes*, 55 I.D. 14 (1934). In that opinion, the Solicitor noted the well-established power of tribes to tax and otherwise regulate non-Indians, and observed that the laws of a tribe in subject areas within its jurisdiction, "may be lawfully administered in the tribunals of the tribe . . . ." 55 I.D. at ——, *reprinted in* I Op. Int. Sol. 445, 471. *See also* F. Cohen, *Handbook of Federal Indian Law* 145 (1942) ("[T]he judicial powers of the tribe are coextensive with its legislative or executive powers.")

non-Indian suitors to bring their claims in tribal court yet exempting them from tribal process when they are defendants strains reason. So too does the notion that an Indian must abide by tribal court adjudications of liability against him, yet may not call upon that court to give redress for injuries done him by a non-Indian.[6] No sound reason exists why a tribal court should be entrusted with the non-Indian plaintiff's valuable chose in action, yet may not be trusted to adjudicate the monetary liability of the non-Indian defendant in cases such as this one. Thus, as this Court has stated, without distinction between plaintiff and defendant:

> Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.

Santa Clara Pueblo v. *Martinez*, 436 U.S. 49, 65 (1978).

B. The limitation on tribal power recognized in *Oliphant* v. *Suquamish Indian Tribe*, analyzed in light of the interests protected by it and its historical evolution, does not apply to tribal civil adjudicatory jurisdiction.

Tribal power over non-Indians, of course, is not without limitation. In *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), for example, this Court held that

[6] The district court, apparently recognizing the untenability of such a distinction, dismisses the *Williams* rule as "old law" and seems to say that the decision in Montana v. United States, 450 U.S. 544 (1981) overrules *Williams*. *See* 560 F. Supp. at 217. This, quite clearly, is not so. The *Montana* Court itself cites *Williams* as support, 450 U.S. at 566, and this Court has cited *Williams* favorably on several occasions since the *Montana* decision. *E.g.*, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 103 S.Ct. 2378, 2385 (1983); Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, —— U.S. ——, 104 S.Ct. 2267, 2271 (1984). While the latter case indicates that the state courts will have concurrent jurisdiction in some instances, the decision implicitely assumes that tribal court jurisdiction over civil suits against non-Indians is proper. *Id.* at 2275. The petitioners, interestingly, fail even to mention *Williams* in their brief.

Indian tribes lack the power to try and punish non-Indians for offenses against tribal law. The rule in *Oliphant*, however, does not operate to bar tribal civil adjudicatory jurisdiction. "The development of principles governing civil jurisdiction in Indian Country has been markedly different from the development of rules dealing with criminal jurisdiction." F. Cohen, *Handbook of Federal Indian Law* 253 (1982 ed.)

As this Court observed in *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-153 (1980), "Executive Branch officials have consistently recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest . . . ." Indeed, the most comprehensive legal opinion extant regarding tribal powers holds flatly that:

> [O]ver all of the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business.

Powers of Indian Tribes, 55 Interior Dec. 14, 50, I Op. Int. Sol. 445, 467 (1934). In those subject areas as to which the tribes may regulate non-Indians, they also have the power of adjudication. Tribal laws "may be lawfully administered in the tribunals of the tribe." *Id.*, I Op. Int. Sol. at 471.

The various administrative sources cited by the Court in *Oliphant* to show that the Executive Branch assumed the absence of tribal criminal jurisdiction draw a plain distinction and contrary assumption with regard to tribal civil jurisdiction. Thus, in *Jurisdiction of the Courts of the Choctaw Nation*, 7 Op. Att'y Gen. 174 (1855), the Attorney General was asked whether the tribal courts had jurisdiction over a dispute arising between Indians

and a non-Indian living within the Choctaw Nation. The Attorney General, as did this Court in *Oliphant*, noted that the Choctaw treaty with the United States contained provisions "of very significant character having exclusive reference to the question of *criminal* jurisdiction." *Id.* at 178 (emphasis in original), *and see Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 197-199 (1978). Congress had enacted a comprehensive scheme of criminal jurisdiction over offenses by or against non-Indians in which tribal forums had no role to play. 7 Op. Att'y Gen. at 179; *Oliphant*, *supra*, at 200-201.

Civil jurisdiction, however, was another matter entirely.

> But there is no provision of treaty, and no statute, which takes away from the Choctaws jurisdiction of a case like this, a question of property strictly internal to the Choctaw nation; nor is there any written law which confers jurisdiction of such a case in any court of the United States. . . .
> . . .
>
> The conclusion seems to me irresistible, not that such questions are justiciable nowhere, but that they remain subject to the local jurisdiction of the Choctaws.
> . . .
>
> Now, it is admitted on all hands . . . that Congress has 'paramount right' to legislate in regard to this question, in all its relations. *It has legislated, in so far as it saw fit, by taking jurisdiction in criminal matters, and omitting to take jurisdiction in civil matters. . . . By all possible rules of construction the inference is clear that jurisdiction is left to the Choctaws themselves of civil controversies arising strictly within the Choctaw Nation.*[7]

7 Op. Att'y Gen. at 179-181 (emphasis added).

[7] The non-Indian subjected to tribal civil jurisdiction under the Attorney General's opinion was an adopted citizen of the Chickasaw Nation. Note, however, that his status as a Chickasaw citizen could not subject him to tribal criminal jurisdiction, because he remained a citizen of the United States. By the same token, the fact that he was a United States citizen did not immunize him from tribal civil jurisdiction.

The Executive Branch's actions toward tribal courts confirm the operative assumption that tribal courts have civil jurisdiction over non-Indians. Since 1935, the regulations governing tribal "C.F.R. courts," *see Oliphant*, *supra*, at 196 n. 7, have provided for tribal civil jurisdiction over non-Indians where the parties consent to it. *See* F. Cohen, *Handbook of Federal Indian Law* 254 n. 102 (1982 ed.) No non-Indian, quite obviously, can confer jurisdiction on a tribal court where such jurisdiction does not exist. Thus, although the tribes operating C.F.R. courts condition their assumption of jurisdiction over non-Indians by requiring non-Indian consent, that consent does not create subject matter jurisdiction that the tribe otherwise would lack. The Department of Interior also has approved tribal laws that assert jurisdiction over non-Indians. *See, e.g., Cowan* v. *Rosebud Sioux Tribe*, 404 F. Supp. 1338 (D.S.D. 1975).[8] The Executive

Tribal citizenship, of course, is not and never has been necessary for a person to be subject to tribal civil jurisdiction. Some nexus, however, between the non-Indian or his conduct and tribal interests to be protected by tribal jurisdiction is necessary. *Cf., Montana* v. *United States*, 450 U.S. 544, 565-566 (1981). The nexus required and its presence in this case is discussed *infra* at Section I.C.

[8] The fact that the present form of tribal adjudicatory bodies is of relatively recent origin hardly suggests that the tribes lacked civil jurisdiction, or have not exercised such jurisditcion as a historical matter. Non-Indians entering tribal domains and dealing with Indians no doubt conformed their conduct to tribal mores and submitted to whatever dispute resolution mechanisms existed. That such exertions of tribal authority would not be recognizable as "civil adjudicatory jurisdiction" to the modern eye cannot change their fundamental character as such.

The demands of modern governance have forced most tribes to abandon their traditional methods of dispute resolution in favor of the formalized structures and processes of Anglo-American

Branch long has assumed and stated explicitly that, absent limitations imposed by treaty or an act of Congress, Indian tribes retain civil jurisdiction, both regulatory and adjudicatory, over matters involving Indians and non-Indians arising in Indian Country.

Congress, moreover, has evinced a similar understanding. As noted by the editors of the 1982 edition of the *Handbook of Federal Indian Law*, Congress has acted disparately and, presumably, on a different set of assumptions, in the separate areas of criminal and civil jurisdiction.

> Congress has provided for federal jurisdiction over interracial crimes in Indian country since the late eighteenth century and federal statutes today establish a comprehensive set of criminal provisions applicable to Indian country. In the civil field, however, Congress has never enacted general legislation to supply a federal or state forum for disputes between Indians and non-Indians in Indian country. Furthermore, although treaties between the federal government and Indian tribes sometimes required the tribes to surrender non-Indian criminal offenders to state or federal authorities, Indian treaties did not contain provision for tribal relinquishment of civil jurisdiction over non-Indians. Congress' failure to regulate civil jurisdiction in Indian country suggests . . . that there was no jurisdictional vacuum to fill . . . .

judicial bodies. During the genesis of modern tribal courts, tribal governments, at the urging of federal officials, constrained the jurisdiction of their courts over non-Indians to some degree. *See* F. Cohen, *Handbook of Federal Indian Law* 382 (1942). As time passed and tribal courts acquired greater experience and sophistication, they asserted theretofore unexercised powers of civil jurisdiction, again often with the approval of federal authorities. *See generally Indian Self-Determination and the Role of Tribal Courts* 11-60 (American Indian Lawyer Training Program 1977). That these governments deferred assertion of jurisdiction over non-Indians until adequate procedures and capabilities were developed should not be read as an absence of such jurisdiction.

F. Cohen, *Handbook of Federal Indian Law* 253-254 (1982 ed.); and *cf.*, *Oliphant*, *supra*, at 201-202 (Congressional legislation governing criminal jurisdiction over non-Indians in Indian Country suggests absence of tribal jurisdiction).

The decisions of the Court confirm this analysis. In *Williams* v. *Lee*, 358 U.S. 217 (1959), the Court held that the Navajo Tribal Court had exclusive jurisdiction to adjudicate a contract dispute involving an Indian and a non-Indian arising on the Navajo Reservation. The Navajo treaty with the United States, Treaty of June 1, 1868, 15 Stat. 667, contained provision for federal jurisdiction over interracial crimes on the reservation. No provision was made, however, for the adjudication of non-criminal wrongs by or against Indians on the reservation. The Court held that, in light of the treaty, the Navajo courts not only had jurisdiction over the matter, but exclusive jurisdiction.

The same result was reached in *Kennerly* v. *District Court*, 400 U.S. 423 (1971). In that case, the Blackfeet Tribe was held to have exclusive jurisdiction over the same sort of dispute as was present in *Williams*. The Blackfeet Tribe was party to the Sioux Treaty of 1868. Treaty of April 29, 1868, 15 Stat. 635. Like the Navajo treaty referenced above, the Blackfeet treaty made provision for interracial crimes, but not interracial civil disputes.[9]

Clearly, then, the shared assumption of the three branches of the federal government was and is that Indian tribes have, and always have had, civil authority, both regulatory and adjudicatory, over non-Indians. "In these respects the present case[] differ[s] sharply from *Oliphant* . . . , in which [the Court] stressed the shared

[9] The Crow Treaty of May 7, 1868, 15 Stat. 667, contains provisions identical in substance to those contained in the Navajo and Blackfeet treaties.

assumptions of the Executive, Judicial and Legislative Departments that Indian tribes could not exercise criminal jurisdiction over non-Indians." *Cf. Washington, supra*, 447 U.S. at 153.

Neither may it be said that subjecting non-Indians to the rules of substantive and procedural law enforced by tribal courts is somehow unfair. *See Oliphant, supra*, at 210-211. Unlike substantive criminal law, courts are free to apply the substantive civil law of other jurisdictions where appropriate. *See* I Restatement of the Law (Second), *Conflict of Laws 2d* § 6 (1971). *See also* Note, *Conflict of Laws and the Indian Reservation*, 8 Am. Indian L. Rev. 361 (1981). Tribal adjudication of disputes involving non-Indians, therefore, does not "seek to impose upon them the restraints of an external and unknown code," a concern expressed by this Court in *Oliphant*. *Cf.* 435 U.S. at 210-211, *quoting Ex Parte Crow Dog*, 109 U.S. 556, 571 (1883).

Indeed, the contrary is true. Tribal courts are competent tribunals applying familiar rules of substantive law and operating under rules of procedure with which non-Indians are well-acquainted.[10] The Crow Tribal Court in this case did not seek to apply some bizarre or arcane rule of liability known only to the Crows. Indeed, it found, upon hearing the plaintiff's evidence after the defendant's default, that the school district failed to meet standards established for it by the State of Montana. *See Sage* v. *Lodge Grass School District*, 10 Indian L. Rep. 6019 (Crow Tr. Ct. 1982).

Neither the legal authorities nor the policy considerations upon which the Court relied in *Oliphant* support a holding that tribal courts generally lack civil adjudicatory authority over non-Indians. The remaining question, therefore, is whether a tribal interest of sufficient magnitude is presented in civil adjudications against non-

[10] *See* Section III, *infra*.

Indians which would justify the assertion of tribal power. The answer to this question is found in this Court's decision in *Montana* v. *United States*, 450 U.S. 544 (1981).

C. The District Court plainly erred in holding that *Montana* v. *United States* forecloses the exercise of tribal jurisdiction in this case.

The general rule is that, if the tribe has some governmental interest in non-Indian conduct on fee land within the reservation, there is no impediment to tribal jurisdiction.[11] Thus, in *Buster* v. *Wright*, 135 F. 947, 951 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906), the court observed that "the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it . . . ." *And see Morris* v. *Hitchcock*, 194 U.S. 384, 392 (1904).

The Executive branch shares this understanding of tribal power:

> [E]ven if the Indian title to the particular lots sold had been extinguished . . . the result is still the same, for the legal right to purchase land within an Indian nation gives to the purchaser no right of exemption from the laws of such nation.

23 Op. Att'y Gen. 214, 217 (1900). In the comprehensive opinion on the powers of tribal governments, the Interior Department Solicitor reached a similar conclusion. 55 Interior Dec. 14, 50 (1934).[12]

[11] *A fortiori*, when non-Indians enter reservation lands owned by Indians, they are subject to tribal civil authority. *Montana, supra* at 557. On those reservations where all of the land is owned by Indians, therefore, the tribes always will have civil jurisdiction over non-Indians.

[12] Each of these authorities is cited with approval in *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-153 (1980), in support of the Court's holding that tribes may impose cigarette taxes on non-Indian purchasers.

Thus, as the Court noted in *Montana*, the tribal interest justifying regulation must be shown to derive from consensual dealings by the non-Indians with tribal members, or conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." 450 U.S. at 566. The district court's analysis of this last principle misses the mark. The court stated that although a personal injury obviously affects the health and welfare of the injured person, it does not affect the health and welfare of the Tribe, because "an individual is not a tribe." 560 F. Supp. at 216-217.[13]

This Court has rejected the notion that tribal interests are not at issue in cases involving the affairs of individual Indians. In *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 163, 181 (1973), the State argued that the imposition of its income taxes on reservation Indians affected only the interests of individual Indians and not those of the tribe. The Court noted that

> when Congress legislates on Indian matters, it has, most often, dealt with the tribes as collective entities. But those entities are, after all, composed of individual Indians, and the legislation confers individual rights.

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[13] Of course, a tribe *qua* tribe has no "health or welfare" except in a metaphoric sense. People have or lack health or welfare, and the health and welfare of a government is no more than the collective health and welfare of its people. Moreover, the Court in *Montana*, in making its assertion regarding the health and welfare of the tribe, cited, *inter alia*, *Williams* v. *Lee*, 358 U.S. 217, 220 (1959), a case which, of course, involved a single transaction and a single Indian.

In *Montana*, of course, no Indians were shown to be affected by the non-Indian conduct that the Tribe sought to regulate. In contrast, this case presents a situation in which an Indian has suffered direct, tangible harm from non-Indian conduct. This fact alone distinguishes this case from *Montana* and requires a different result regarding the existence of tribal jurisdiction.

This approach applies as well to individual civil actions. *See Babbitt Ford Inc.* v. *Navajo Indian Tribe*, 710 F.2d 587, 594 (9th Cir. 1983).

Tribal governmental interests are the sum of the interests of its people. The opinions in *Williams* v. *Lee*, 358 U.S. 217 (1959), and *Fisher* v. *District Court*, 424 U.S. 382 (1976), demonstrate this point clearly. The governmental interests that a tribe has in a single injury to a single tribal member cannot be divorced from the whole of like occurrences. Viewed as a single incident, such an occurrence never will give rise to a governmental interest sufficient to justify tribal jurisdiction.[14] Viewed as a part of a class of such occurrences, however, personal injury to a tribal member clearly affects the health and welfare of the tribe, and the tribe may bring its power to bear to redress the injury and govern the conduct causing it.[15]

In sum, a tribal member has been injured in the course of his on-reservation activities. He alleges that his injury results from the negligence of a non-Indian entity resident on the reservation. He has petitioned the court established by his tribe for redress of his injury. The tribal

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[14] A single instance of negligence would not seem to be an important governmental interest for a state government either. Yet the universal existence of tort law demonstrates that reallocation of losses from those upon whom they fall to those whose negligence cause the losses *is* an important governmental function.

[15] This Court is well-acquainted with the concept of the aggregation of single acts giving rise to governmental control of the whole class of such acts. In *Wickard* v. *Filburn*, 317 U.S. 111 (1942), a single small farmer sought exemption from federal wheat acreage allocation laws on the grounds that his conduct, standing alone, had no conceivable effect on the national economy. The Court rejected that contention, noting properly that even though the activities of a single small farmer had no perceptible impact on interstate commerce, the aggregate of the activities of all such farmers did affect commerce and gave rise to a national power to regulate those activities. A similar approach is appropriate here.

interest is clear. Non-Indian conduct allegedly has affected directly the health and welfare of a tribal member, and similar conduct, if repeated, threatens the health and welfare of other tribal members. One cannot say, therefore, that the health and welfare of the tribe is unaffected, or that the tribe lacks a governmental interest in the subject matter. Therefore, a tribe always will have jurisdiction over a personal injury action brought by an Indian against a non-Indian that arises on the reservation.

D. Tribal jurisdiction over the School District is not barred by sovereign immunity.

The School District's status as a political subdivision of the State does not immunize it from tribal jurisdiction. Just as a tribe is subject to state jurisdiction for its off-reservation activities, *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), so too should a state be subjected to tribal processes for its on-reservation activities. *Cf. Nevada* v. *Hall*, 440 U.S. 410 (1979).[16] Moreover, "even if the State's interests were implicated . . . , it must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Washington, supra*, at 154.

Also significant is the fact that Montana has waived its immunity from suit. Article 2, § 18 of the Montana

[16] In this regard, the School District's presence on the reservation would seem to be more voluntary than is indicated in the petitioner's brief. The federal government, in the Crow Allotment Act of 1920, 41 Stat. 751, offered the State the option of acquiring the "Section 16s" (the traditional "school sections") on the Reservation, in return for the State's assurance that Crow children would be allowed "to attend the public schools of said state on the same conditions as the children of white citizens of said state." *Id.* The suggestion that this provision required the State to open schools on any Section 16 thus acquired is a dubious proposition. In any event, the State clearly was not compelled to exercise its option, and the State, therefore, entered the Reservation on a voluntary basis.

Constitution provides that: "The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property." Although the petitioners urge that Mont. Code Ann. § 2-9-311 (1983) limits this waiver to the State's own courts, neither the Constitution nor, indeed, the statute itself express such a limitation.[17] At least until such time as State tribunals have addressed the issue definitively, the constitutional waiver should be given its plain meaning.

II. Assuming that federal courts have jurisdiction over such matters,[18] out of respect for tribal processes and prerogatives, and in order that wasteful and unnecessary litigation be avoided, federal courts should abstain from hearing cases brought by non-Indian challengers until tribal remedies have been exhausted.

A. Traditional concerns regarding comity and solicitude for tribal self-government require that tribal courts have the first opportunity to resolve questions as to their jurisdiction.

As was noted by Judge Wright in his opinion below, 736 F.2d 1324-1326, the "proper forum for [determining the scope of tribal court jurisdiction], at least in the first instance, is not a federal court but a tribal court." *Quoting* majority opinion at 1323-1324 (brackets in original). Several policy objectives support a rule requiring federal courts to abstain from cases challenging tribal court jurisdiction until the challengers first exhaust tribal remedies.

[17] The decision in Montana v. Peretti, 661 F.2d 756 (9th Cir. 1981), is inapposite. The court there held merely that the constitutional waiver was not sufficiently express to infer a waiver of the State's Eleventh Amendment immunity under the strict standards of Edelman v. Jordan, 415 U.S. 651, 673 (1974).

[18] *Amici* here do not mean to concede the existence of federal jurisdiction over this matter.

In *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 70 (1978), this Court took note of the "intrusive effect of federal judicial review upon tribal self-government" in finding that the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1982), does not authorize federal court actions against tribal governments for alleged violations of the Act, save when the relief requested is a writ of *habeas corpus*. Similar concerns are present with greater force when the challenge to tribal action involves not merely the manner in which tribal power is exercised, but the very existence of tribal power.[19]

Before this Court's decision in *Martinez*, the lower federal courts had imposed upon the challengers of tribal action a requirement that they exhaust their remedies in tribal forums before bringing their claims to federal court. *See, e.g., Janis* v. *Wilson*, 521 F.2d 724 (8th Cir. 1975); *Howlett* v. *Salish & Kootenai Tribes*, 529 F.2d 233 (9th Cir. 1976). The reasons for this requirement were eminently sound and equally applicable in cases challenging tribal jurisdiction. First, the exhaustion requirement was intended to strengthen tribal government and cultural identity, policy goals which are undermined when federal courts unnecessarily intrude before tribal processes have run their course. *Rosebud Sioux Tribe* v. *Driving Hawk*, 534 F.2d 98, 100 (8th Cir. 1976).

Second, the exhaustion requirement prevents premature action by federal courts. In some instances, tribal

[19] But for the result in *Martinez*, the instant case well might be presented in an entirely different context. Before *Martinez*, had the petitioners here appeared in tribal court to challenge the default judgment and been denied relief, they could have brought an Indian Civil Rights Act action. Instead, because *Martinez* denies federal jurisdiction over such actions, the petitioners assault the *existence* of tribal power rather than its *exercise*. Ironically, a decision supporting tribal government thus becomes a threat to it. Unable to avail itself of the surgeon's scalpel previously available under ICRA, the district court instead reached for the axe provided by *Oliphant* and proceeded to lop off the head of the tribal court.

courts may interpret tribal law in such a manner as to render moot the claim a challenger wishes to bring. *See McCurdy* v. *Steele*, 506 F.2d 653, 656 (10th Cir. 1974).[20] Federal courts not only should defer to tribal interpretations of tribal law, *Tom* v. *Sutton*, 533 F.2d 1101, 1105 (9th Cir. 1975); *Runs After* v. *Cheyenne River Sioux Tribe*, 437 F. Supp. 1035, 1037 (D. S.D. 1977); *Conroy* v. *Frizzell*, 429 F. Supp. 918, 923-24 (D. S.D. 1977), but also should allow the tribe to decide key questions before they are brought to federal court.

Finally, the exhaustion requirement was grounded in notions of comity. "The same principles of comity that apply in federal court-state court relations are forcefully applicable in federal court-tribal court relations." *Brunette* v. *Dann*, 417 F. Supp. 1382, 1386 (D. Idaho 1976). A proper solicitude for tribal processes, therefore, was evidenced by the courts.

These self-same considerations support the imposition of an exhaustion requirement in cases such as this one. Modern federal policy seeks to strengthen tribal self-government. *Martinez, supra*, at 59-65; *cf. Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). A key aspect of this policy is the strengthening of tribal legal institutions. *See Martinez, supra*, at 63-64.[21] A fundamental power of any judicial forum is the ability to determine the extent of its jurisdiction under applicable law. *Cf.* Wright, *Law of Federal Courts* § 16 (1976); *and see United States* v. *United Mine Workers*, 330 U.S. 258 (1947). Tribal courts are thoroughly familiar with the limita-

[20] Some tribal courts, for example, disclaim jurisdiction over actions involving non-Indians absent consent from the parties. *See* F. Cohen, *Handbook of Federal Indian Law* 254 n.102 (1982 ed.).

[21] For example, *amici* Standing Rock Sioux Tribe, Assiniboine and Sioux Tribes and Cheyenne River Sioux Tribe have received grants for revision of tribal codes under the Indian Self-Determination and Education Assistance Act. Pub. L. 93-638, 88 Stat. 2203 (1975).

tions on their jurisdiction imposed by federal law, perhaps more familiar than any other court. See discussion *infra* at Section III.

This Court, of course, has the power to create such a requirement. The various abstention doctrines developed by the Court demonstrate this power. Abstention of the type discussed in *Middlesex County Ethics Committee* v. *Garden State Bar Association*, 457 U.S. 423 (1982) is most apt.

In *Middlesex*, the Court discussed the policies underlying abstention. Among those policies was the notion of comity—the belief that the federal system fares best if the states are left free to perform their functions in their own way. The notion of comity, moreover, precludes any presumption that the state will not safeguard rights existing under federal law.

The idea of comity also is appropriate in federal-tribal relations. As noted above, federal policy favors strengthening tribal government, and fulfillment of the federal responsibility to Indians is accomplished through the medium of tribal government. Surely this federal responsibility is met best when the tribes "are left free to perform their separate functions in their separate ways." *Cf. Middlesex*, *supra*, at 432.

In *Middlesex*, the Court identified three inquiries relevant to determining the propriety of abstention. The first is whether there is an ongoing state proceeding in which the challenge to state power may be litigated. In this case, substituting "tribe" for "state", that requirement clearly is met. The Crow Tribal Court proceeding was under way before the federal action, and should have been allowed to run its course.

The second inquiry is whether the state proceedings implicate important state interests. In analogizing to the present situation, the question would be whether the issue to be litigated in federal court implicates important tribal interests. Issues involving the extent of tribal jurisdiction quite clearly implicate important tribal interests. Indeed, because the federal court action here attacks the very existence of tribal jurisdiction, the intrusion on tribal policy is far more profound that the intrusion on state interests resulting from concurrent federal and state proceedings.[22] Tribal courts should have the opportunity to resolve such cases in the first instance.

The third inquiry is whether there is an adequate opportunity in the state proceedings to raise constitutional challenges. To analogize again to this situation, clearly there exists under Crow Tribal Court procedures a means by which the jurisdictional issue may be litigated. Indeed, tribes *must* offer such a procedure under the Indian Civil Rights Act, 25 U.S.C. § 1302 (1982). Under ICRA, a tribe may not deny due process of law. To act without jurisdiction is a fundamental failure of due process for which a tribe must offer redress. *See Martinez*, *supra*, at 65.

In view of the federal policy of strengthening tribal government and tribal courts, and in order to avoid needless litigation, federal courts should take jurisdiction over challenges to tribal civil adjudicatory jurisdiction, if at all, only when the challengers have exhausted tribal remedies. These cases, after all, affect the tribes more profoundly than they affect private parties, and the tribal courts deserve the opportunity to have their views made known before the intrusive power of the federal government is brought to bear.

B. The conduct of the petitioners in this matter exemplifies the unhappy consequences following from the absence of a requirement that challengers of tribal jurisdiction first exhaust their tribal remedies.

Assuming, *arguendo*, that the Crow Tribe has "thrown down the gauntlet," Pet. Br. at 22, then it is the peti-

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[22] An attack of this sort on state jurisdiction would be forbidden by the Anti-Injunction Act. 28 U.S.C. § 2283 (1982).

tioners' failure to show even a minimal degree of respect for tribal processes which has forced this unfortunate confrontation. Had the petitioners properly answered the summons and complaint served upon them, no default judgment would have been entered. Had they moved to set aside the default judgment in accordance with Rule 17(d) of the Crow Rules of Civil Procedure before repairing to federal court, the case might never have come this far. Had they appeared specially to challenge jurisdiction in accordance with Crow Rule 7, the case might have ended at that point. Had they defended on the merits of the negligence claim, a judgment in their favor might have resulted. Had they presented their arguments regarding the immunity from seizure of School District property to the Tribal Court, that court may well have formulated a different method of judgment execution, had a trial on the merits resulted in a judgment against the District at all.

But the School District and its insurer, in a regrettable display of disdain for legitimate tribal processes, attempted to circumvent those processes and seek sanctuary in the federal courts. What once was a garden-variety civil action now has mushroomed into a case of constitutional dimension threatening tribal powers the existence of which has been acknowledged by federal authorities for more than a century. Three federal courts will have passed on the case before litigation on the merits has occurred. This case demonstrates, as could no other, the pernicious consequences and needless confrontation which results when non-Indian challengers to tribal authority are allowed to circumvent legitimate tribal processes established for the resolution of such questions. Imagine the protests which would have come from Montana officials had the Indian parties in *Kennerly* v. *District Court*, 400 U.S. 423 (1971) or *Fisher* v. *District Court*, 424 U.S. 382 (1976), taken their challenges to state jurisdiction directly to federal district court without first abiding by state processes. In each case, the

Montana courts were found by this Court not to have jurisdiction, yet the Indian parties litigated the jurisdictional issues in Montana courts. Tribal courts are entitled to similar respect.

III. Tribal courts are modern judicial tribunals applying familiar rules of law and procedure and wholly capable of applying the complex federal law regarding tribal jurisdiction.

"Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts." *Cf. Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 211-212 (1978). Indeed, at the urging and with the assistance of the federal government,[23] tribal courts, laws and procedures, have developed to the point that they often are indistinguishable from lower state tribunals. Tribal Courts have established rules of procedure not unlike those of state courts, and have displayed a particular facility for analyzing federal law regarding tribal jurisdiction.

Thus, in *Crow Creek Sioux Tribe* v. *Buum*, 10 Indian L. Rep. 6031 (Intertribal Ct. App. 1983), the court conducted a sophisticated analysis of the jurisdiction of tribal courts in the areas of civil and criminal contempt. Holding that tribes may hold non-Indians in civil, but not criminal, contempt of court, the court reversed the lower court's entry of a contempt order on the grounds that the tribal law authorizing contempt sanctions violated the Indian Civil Rights Act.

In *North Dakota ex rel. Wefald* v. *Kelly*, 10 Indian L. Rep. 6059 (Standing Rock Sx. Tr. Ct. 1983), the court reviewed federal law and found tribal jurisdiction over an action brought by the State to collect on a debt owed by a tribal member. In *Fisher* v. *District Court*, 424 U.S. 382 (1976), this Court reversed the Montana Supreme Court and agreed with an opinion of the Appellate

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[23] *See* note 21, *supra*.

Court of the Northern Cheyenne Tribe that the Tribal court had exclusive jurisdiction of a child custody matter involving only Indians.

One tribal decision of note already has been brought to the Court's attention. In *Blackfeet Tribal Business Council* v. *East Glacier Water & Sewer District*, 11 Indian L. Rep. 6021 (Blackfeet Tr. Ct. 1984), the court found tribal jurisdiction over a non-Indian public corporation. Despite the suggestions of *amici* Glacier County and East Glacier Water & Sewer District, Br. Amicus Curiae in Support of Petition (filed Oct. 26, 1984), the Blackfeet Tribal Court is not a lawless marauder running roughshod over defenseless non-Indians in violation of its own charter. Indeed, the Tribal Court's opinion is learned and reasoned, applying the relevant precedents and grounding its decision on sound analysis and public policy.

The court first noted that jurisdiction exists, if at all, under the grant of power to the court contained in the Tribal Constitution. It then noted the existence of relevant federal precedent but added, correctly it would seem, that tribal forums are the ultimate arbiters of the meaning of tribal law. The court then cited a federal district court decision, *United States ex rel. Rollingson* v. *Blackfeet Tribe*, 244 F. Supp. 474 (D. Mont. 1965), in which the federal court ruled that a dispute between a non-Indian and a tribal judge was within the exclusive jurisdiction of the Blackfeet Tribal Court. The court went on to note relevant precedents from this Court, including *Kennerly* v. *District Court*, 400 U.S. 423 (1971), which held that the Blackfeet Tribal Court had exclusive jurisdiction over a debt action arising on the Reservation and involving both Indian and non-Indian parties.[24] The court

[24] The Sewer District's position thus takes on a special irony. If it wants to collect by judicial action the debts owed it by Blackfeet Tribal members, the decision in *Kennerly* requires it to repair to the very court of whose jurisdiction it now makes complaint.

then noted the historic practice of non-Indians using the Tribal Court, and identified sound policy reasons favoring the existence of tribal jurisdiction.

Whether or not the Blackfeet court ultimately is found to be correct, and *amici* assert that it was correct, these are not the lunatic ravings of a judge unable to live within the legal limits of his power. Rather, it is an example of sound scholarship and reason from an Indian jurist faced with difficult issues of tribal and federal law.

The tribal court procedures found in modern tribal codes are fully adequate to assure fair, reasonable and accurate adjudication.[25] Indeed, tribal procedures often are drawn from the procedures of state and federal courts. These codes contain rules governing pre-trial procedures, trials and judgments. *E.g.*, Title II, Standing Rock Sioux Tribe Code of Justice; Crow Rules of Civil Procedure. Although usually more simple than the complex rules governing procedure in state and federal courts, tribal rules have as their guiding standards the same principles as those applicable to federal and state rules. Thus, the Devils Lake Sioux Tribe Law and Order Code provides, at Chapter I, Title B, § 104(2)(a) that "[t]his Code shall be liberally construed to effect its purpose and to promote justice." *Compare* Fed. R. Civ. P. 1.

Except where a specific tribal policy requires otherwise, the substantive rules of tribal law are likely to be much the same as those of the states. Indeed, many tribal courts apply the substantive law of the state in which they are located in the absence of countervailing tribal or federal law. *E.g.*, 25 C.F.R. § 11.23(c) (1984) ("[Matters not covered by tribal or federal law are decided] according to the laws of the State in which the matter in dis-

[25] The portions of the Tribal Codes of *amici*, Assiniboine and Sioux Tribes, Devils Lake Sioux Tribe and Standing Rock Sioux Tribe, which deal with courts and civil procedure have been lodged with the Clerk of the Court and served on counsel for the parties.

pute may lie."); Comprehensive Code of Justice of the Assiniboine and Sioux Tribes § 501(d) ("Where appropriate, the Court may . . . be guided by the statutes, common law or rules of decision of the States . . . ."). *See also* F. Cohen, *Handbook of Federal Indian Law* 334-335 (1982 ed.).

Finally, note should be taken of the increasing capabilities of the Indian judiciary. A variety of training programs for tribal judges are regularly conducted on every imaginable topic. The tremendous upsurge in the number of Indians who have law degrees and their desire to serve in tribal judiciaries guarantee continued improvement in tribal court functions.

Modernized tribal codes, increased training for tribal judges and the influx of Indian people having law degrees promise that tribal courts will continue their rapid progress. The quality of justice they now dispense certainly meets the constitutional and statutory norms, and will continue to improve. This Court should allow this evolution to continue and take its natural course.

CONCLUSION

For the foregoing reasons, the mandate of the Court of Appeals should be affirmed.

Respectfully submitted,

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Office - Supreme Court, U.S.
FILED
MAR 18 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-320

In The
Supreme Court of the United States
October Term, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES, et al.,

Petitioners,

v.

CROW TRIBE OF INDIANS, et al.,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF FOR CROW RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Crow Tribe's sovereign immunity bars this action against the Crow Tribe, the Crow tribal entities and the Crow tribal officials.

2. Whether the Federal District Court properly entertained a suit challenging the civil jurisdiction of the Crow Tribal Court over a tort suit brought by a tribal member against a local School District based on an accident that took place within the Crow Reservation, when there was no claim of imminent irreparable injury and the School District had not appeared before the Tribal Court or made any attempt to exhaust tribal court remedies.

3. Whether the Crow Tribal Court may, as a matter of federal law, exercise civil jurisdiction over a tort suit brought by a tribal member against a School District when the accident took place on school grounds within the Crow Reservation, the accident was caused by the negligent maintenance of a dangerous condition and/or the inadequate supervision of Crow children during school hours, and the School District has regular, extensive, and significant contacts and connections with the Crow Tribe and its members.

TABLE OF CONTENTS

	Pages
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. SOVEREIGN IMMUNITY BARS THIS ACTION AGAINST THE CROW TRIBE AND THE CROW TRIBAL ENTITIES AND OFFICIALS.	7
II. THE FEDERAL DISTRICT COURT SHOULD NOT HAVE ENTERTAINED THE SUIT CHALLENGING THE CROW TRIBAL COURT'S JURISDICTION OVER THE TORT SUIT.	13
III. THE CROW TRIBAL COURT HAS JURISDICTION OVER THE TORT SUIT BROUGHT BY TRIBAL MEMBERS AGAINST THE SCHOOL DISTRICT WITH RESPECT TO AN ACCIDENT OCCURRING WITHIN THE CROW RESERVATION.	21
A. Indian Tribes Retain the Inherent Sovereign Power to Adjudicate Civil Causes of Action Arising Within Reservations and Involving Tribal Members.	21
B. The Crow Tribal Court is Not Deprived of Its Jurisdiction by the Nature of the School District or the Title Status of the School Grounds.	28
Conclusion	33

TABLE OF AUTHORITIES

CASES:	Pages
Alabama v. Pugh, 438 U.S. 781 (1978)	8
Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970)	17
Babbit Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983), *cert. denied*, — U.S. —	22
Boddie v. Connecticut, 401 U.S. 371 (1971)	23, 25
Buster v. Wright, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906)	22
Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982), *cert. denied*, 459 U.S. 967	22
Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982), *cert. denied*, 459 U.S. 977	24
Cowan v. Rosebud Sioux Tribe, 404 F. Supp. 1338 (D.S.D., 1975)	20
DeCoteau v. U.S. District County Court, 420 U.S. 425 (1975)	33
Donovan v. Dallas, 377 U.S. 408 (1964)	11, 15, 16
Eastern Navajo Industries, Inc. v. Bureau of Revenue, 552 P.2d 805 (N.M. App. 1976), *cert. denied*, 430 U.S. 959	29
Edelman v. Jordan, 415 U.S. 651 (1974)	8, 9
Ex Parte Young, 209 U.S. 123 (1907)	9, 10, 11, 16
Fisher v. District Court, 424 U.S. 382 (1976)	18, 26
Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945)	8
General Atomic Co. v. Feller, 434 U.S. 12 (1977)	11
Howlett v. Salish and Kootenai Tribes, 529 F.2d 233 (9th Cir. 1976)	18
Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)	11, 16, 21

TABLE OF AUTHORITIES—Continued

Pages

Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956) 22

Janis v. Wilson, 521 F.2d 724 (8th Cir. 1975) 18

Juidice v. Vail, 430 U.S. 327 (1977) 11, 16, 20, 21

Kennerly v. District Court, 400 U.S. 423 (1971) 18

Knight v. Shoshone & Arapahoe Tribe, 670 F.2d 900 (10th Cir. 1982) 22

McClanahan v. Arizona Tax Comm'n., 411 U.S. 164 (1973) 27

McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1975) 18

Means v. Wilson, 522 F.2d 833 (8th Cir. 1975), *cert. denied,* 424 U.S. 958 (1976) 18

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 17, 21, 22, 23, 24, 30, 32

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 29, 31, 32

Middlesex Ethics Comm. v. Garden State Bar Ass'n., 457 U.S. 423 (1982) 17

Minnesota v. United States, 305 U.S. 382 (1939) 8

Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976) 32, 33

Montana v. United States, 450 U.S. 544 (1981) 24, 25, 26, 31, 32

Morton v. Mancari, 417 U.S. 535 (1974) 17

Mt. Healthy School District v. Doyle, 429 U.S. 274 (1977) 31

Nevada v. Hall, 440 U.S. 410 (1979) 26, 30, 31

New Mexico v. Mescalero Apache Tribe, 103 S.Ct. 2378 (1983) 17, 21, 22, 24, 25, 29, 31

TABLE OF AUTHORITIES—Continued

Pages

O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140 (8th Cir. 1973) 18

Patsy v. Florida Board of Regents, 457 U.S. 496 (1982) 8, 12, 31

Peck v. Jenness, 7 How. (48 U.S.) 612 (1849) 15

Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968) 12

Puyallup Tribe v. Washington Dept. of Game, 433 U.S. 165 (1977) 8, 10

Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832 (1982) 29

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 3, 7, 10, 18, 19, 23, 25, 26, 27

State ex. rel. Flammond v. Flammond, — Mont. —, 621 P.2d 471 (1980) 27

Steffel v. Thompson, 415 U.S. 462 (1974) 16

Three Affiliated Tribes v. Wold Engineering, 104 S.Ct. 2267 (1984) 24, 27

Trainor v. Hernandez, 431 U.S. 434 (1977) 16

Turner v. United States, 248 U.S. 354 (1919) 8

United States v. Mazurie, 419 U.S. 544 (1975) 18, 21

United States v. Mission Golf Course, 548 F. Supp. 1177 (D.S.D. 1982), *aff'd* 716 F.2d 907 (8th Cir. 1983) *cert. denied,* — U.S. — 29

United States v. United States Fidelity & Guar. Co., 309 U.S. 506 (1940) 8

Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) 21, 22, 24, 25

Webb v. Webb, 451 U.S. 493 (1981) 16, 19

Weinberger v. Salfi, 422 U.S. 749 (1975) 15

TABLE OF AUTHORITIES—Continued

	Pages
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980)	17, 24, 29
Williams v. Lee, 358 U.S. 217 (1959)	17, 18, 23, 24, 25, 26, 27
Younger v. Harris, 401 U.S. 37 (1971)	16, 17
RULE:	
F.R.Civ.P. Rule 19(b)	12
STATUTES AND REGULATIONS:	
18 U.S.C. §1151	33
25 U.S.C. §415	32
25 U.S.C. § 1901(3)	27
28 U.S.C. §2283	16, 21
15 Stat. 649 (1868)	23
41 Stat. 756 (1920)	31
Mont. Const. Art. II, §18	31
TEXTS:	
Cohen's Handbook of Federal Indian Law 257 (1982)	32
Collins, "Implied Limitations on the Jurisdiction of Indian Tribes," 54 Wash. L. Rev. 470 (1979)	26

No. 84-320

—o—

In The
Supreme Court of the United States
October Term, 1984

—o—

NATIONAL FARMERS UNION INSURANCE COMPANIES, et al.,

Petitioners,

v.

CROW TRIBE OF INDIANS, et al.,

Respondents.

—o—

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

—o—

BRIEF FOR CROW RESPONDENTS

—o—

STATEMENT OF THE CASE

In May 1982, Leroy Sage, a ten year old member of the Crow Tribe, was struck by a motorcycle on the grounds of the Lodge Grass Elementary School in Lodge Grass, Montana while returning from a school sponsored activity. The school is located within the exterior boundaries of the

Crow Reservation and 85 percent of its student body are Crow Indians. Five of the nine members of the Lodge Grass School Board also are members of the Crow Tribe.

In September 1982, Leroy Sage filed suit in Crow Tribal Court through his guardian, Flora Not Afraid. The complaint alleged that Sage's injuries were caused by the negligent conduct of Petitioner Lodge Grass School District No. 27 ("the School District"), specifically, the unsafe condition of the school parking lot and inadequate supervision during school hours.

The Chairman of the School Board, a member of the Crow Tribe, was served with process, but the School District did not answer or otherwise appear in Tribal Court. Accordingly, on October 19, 1982, a default judgment was entered in Tribal Court against the School District.[1] On October 25, 1982, the Tribal Court mailed a copy of the default judgment to the Chairman of the School Board. Both the principal official of the School District and its insurer, National Farmers Union Insurance Companies, had actual knowledge of the default judgment by October 29, 1982. Although Crow Tribal Court procedures permit default judgments to be set aside within 30 days, the School District took no action in Tribal Court. *See* Pet. App. 15a-16a; J.A. 16-17.

Instead, on November 2, 1982, the School District and its insurer filed suit in the Federal District Court for

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[1] Under the Crow Tribe's Rules of Civil Procedure, answers must be filed within fifteen days of service. J.A. 7-8, 16-17. The Chairman of the School District was served on September 28, 1982 and the default judgment was taken 21 days later, on October 19, 1982. Pet. App. 16a.

Montana. Named as Defendants were the Crow Tribe, the Crow Tribal Council, the Crow Tribal Court, Eddie Roundface, Glen Birdinground and Ira Lefthand, judges of the Crow Tribal Court, and Donald Stewart, Sr., Chairman of the Tribal Council (the "tribal defendants"). The complaint challenged the validity of the Tribal Court judgment against the School District and National Farmers, alleging that the Tribal Court lacked jurisdiction over the controversy and that the constitutional rights of the School District and National Farmers had been violated by the Tribal Court action. The Tribal Court plaintiffs, Sage and Not Afraid, later were joined as defendants. *See* J.A. xv.

On November 3, 1982, the Federal District Court issued a temporary restraining order enjoining the Tribe and the tribal defendants from executing the Tribal Court judgment.[2] On December 29, 1982, the District Court permanently enjoined execution of the tribal court judgment by any of the individual federal court defendants on the ground that the Tribal Court lacked jurisdiction over the tort that was the basis of the default judgment. Pet. App. 14a-27a.

The Court of Appeals reversed. Based on the reasoning of *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), and its own previous decisions, the majority held that the Crow Tribal Court was the proper forum for determining the extent of its own jurisdiction. Pet. App.

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[2] The District Court's subsequent January 26, 1983 Memorandum Opinion, Pet. App. 14a, incorrectly states (at 16a-17a) that the temporary restraining order was directed to Sage. Actually, at the time that order was issued, Sage and Not Afraid had not yet been joined as defendants. *See* J.A. xiii, xiv, xv.

7a. Consequently, the majority concluded that the complaint must be dismissed for failure to state a claim for federal relief.

In a separate opinion, Judge Wright concurred in the majority's conclusion that the complaint must be dismissed, stating that his "difference with the majority does not stem from any fundamental conflict over the policies at stake." Pet. App. 11a. Although Judge Wright dissented from the holding that federal court review of tribal proceedings was precluded, he stated that such review would be appropriate only after exhaustion of tribal court remedies. Exhaustion was found to be required by the doctrine of comity and by "the federal policy of protecting and strengthening tribal institutions." Pet. App. 11a. Since the School District had not even made an appearance in Tribal Court, the available Tribal Court remedies obviously had not been exhausted and the complaint therefore should have been dismissed.

On August 1, 1984, shortly after the Court of Appeals' mandate was issued, the Crow Tribal Court issued a writ of execution pursuant to which some School District property was seized. Sale of the property was scheduled for August 23. On August 22, the School District appeared in the Tribal Court for the first time, seeking to enjoin the sale and to set aside the default judgment. That Court, in Orders dated August 22 and August 23, postponed the sale, and set a hearing to consider the School District's motion to set aside the default judgment. Br. in Opp. App. 1a-9a.

The School District also applied to Justice Rehnquist for a stay of the Ninth Circuit's mandate. Justice Rehnquist issued a temporary stay on August 21, 1984 and continued the stay on September 10. Reply Br. App. 1a-8a. On September 19, the Tribal Court entered an Order postponing a ruling upon the motion to set aside the default judgment until after final review of the federal court proceedings by this Court. Br. in Opp. App. 10a-15a.

SUMMARY OF ARGUMENT

1. This action cannot be maintained against the Crow Tribe, the Crow Tribal Council, the Crow Tribal Court, the Chairman of the Crow Tribe, and the judges of the Crow Tribal Court owing to their sovereign immunity. While sovereign immunity does not preclude suits against officials who are alleged to have acted beyond the scope of their authority or unconstitutionally, that rule is not applicable here. Only one of the individually named Crow respondents participated in or had anything to do with the actions challenged by the petitioners. That official, Tribal Court Judge Roundface, is not subject to the doctrine permitting injunctions against *ultra vires* actions because courts cannot be enjoined from proceeding in their own way to exercise jurisdiction.

2. The Federal District Court should not have entertained the suit challenging the jurisdiction of the Crow Tribal Court under the circumstances presented in this case. The Crow Tribal Court is the natural and logical forum for the resolution of reservation-based disputes involving tribal members. All defenses to the Tribal Court's jurisdiction should be raised and considered, at least in

the first instance, in that Court. The petitioners' failure even to pursue, let alone exhaust, any tribal court remedies, precludes any consideration of their claims by the federal courts. This result is supported not only by the policies underlying the exhaustion doctrine, but also by fundamental principles governing the relationship between the courts of two different sovereigns within a federal system and by this Court's decisions giving effect to Congress' policy of furthering tribal self-government and protecting the role of tribal courts in resolving civil disputes affecting important personal and property interests of both Indians and non-Indians. This is not an appropriate case in which to speculate about the exceptional circumstances under which it might be appropriate for federal courts to intervene by enjoining parties to tribal court proceedings.

3. The Crow Tribal Court has jurisdiction to adjudicate reservation-based tort claims involving tribal members. The authority to establish a system for resolving disputes arising within its territory and affecting its members is a fundamental characteristic of any organized and cohesive society. That authority is included in the Crow Tribe's retained, inherent sovereignty and it has not been divested by any federal law or by necessary implication of the Tribe's independent status.

The Crow Tribe has an essential interest in providing a forum for the resolution of reservation-based disputes involving its members. That is especially true in this case which also implicates the Tribe's interest in the health, safety and welfare of its children and in the standard of care exercised by those entrusted with their education. Denying the Crow Tribe's jurisdiction in this case would subject a suit arising on the reservation involving

reservation Indians to a forum other than the one they have established for themselves. That would undermine the authority of the tribal court and therefore would infringe on the right of the Crow Indians to govern themselves.

The Crow Tribal Court is not deprived of its jurisdiction by virtue of the nature of the School District or the title status of the school grounds. Although in form the School District is a political subdivision of the State, its substance is predominantly Indian. It takes full advantage of the governmental services, police, fire and judicial, provided by the Crow Tribe and the Bureau of Indian Affairs and does not enjoy the State's immunity from suit. States and their agents should not be treated any differently than Indian tribes which generally become subject to state jurisdiction when they venture off their reservations.

Although the status of land title has an important bearing on some Indian jurisdictional issues, it should not be relevant in this case where nothing would have been any different if the accident had happened on trust land. Moreover, congressional policy strongly disfavors the kind of impractical patterns of checkerboard jurisdiction which would make jurisdiction over tort claims turn on the title status of the land where accidents occur.

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ARGUMENT

I. Sovereign Immunity Bars This Action Against The Crow Tribe And The Crow Tribal Entities And Officials.

This Court repeatedly has held that Indian tribes are immune from suit without express authority in a federal statute or lawful consent. *Santa Clara Pueblo v.*

Martinez, 436 U.S. 49, 58 (1978); *Puyallup Tribe v. Washington Dept. of Game,* 433 U.S. 165, 172-73 (1977); *United States v. United States Fidelity & Guar. Co.,* 309 U.S. 506, 512 (1940); *Turner v. United States,* 248 U.S. 354, 358 (1919). The sovereign immunity defense is jurisdictional in nature. It can be raised at any stage of the litigation and, under most circumstances, will be considered by this Court even if it was not addressed by the lower courts. *Alabama v. Pugh,* 438 U.S. 781 (1978) (per curiam); *Edelman v. Jordan,* 415 U.S. 651, 678 (1974); *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459, 466-467 (1945); *Minnesota v. United States,* 305 U.S. 382, 388-389 (1939). *Cf. Patsy v. Florida Board of Regents,* 457 U.S. 496, 515 n.19 (1982) (Supreme Court did not address sovereign immunity issue raised sua sponte during oral argument where it was not briefed by the parties and the state agency expressly requested that the Court resolve the case on the basis of another issue).

Plaintiff brought this action against the Crow Tribe, the Crow Tribal Council,[3] the Crow Tribal Court, the Chairman of the Crow Tribe and the three judges of the Crow Tribal Court. The Crow respondents specifically alleged that the Federal District Court "is without jurisdiction over the Crow Tribal Council or Court and their respective members," Tribe's 9th Cir. Excerpt of Record 28, and argued to the Court of Appeals that this suit is barred by the sovereign immunity of the Crow Tribe, Crow

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[3] The Crow Tribe's Constitution (See Appendix B to the Crow Tribe's Ninth Circuit Brief) establishes the Crow Tribal Council "to represent, act and speak for the Crow Tribe in any and all tribal matters . . ." The Council consists of all duly enrolled, adult members of the Crow Tribe.

Tribe's Ninth Circuit Brief at 5-9. *See* Pet. App. 7a n.4.[4] No federal law authorizes this action against the Crow Tribe or its entities or officials, nor is there lawful consent. Hence, the action against the Tribe, the Tribal Council, the Tribal Court, and the tribal officials must be dismissed.

Under the rule of *Ex Parte Young,* 209 U.S. 123 (1907), sovereign immunity does not preclude suits against officials who are alleged to have acted beyond the scope of their authority or unconstitutionally.[5] This Court has

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[4] The sequence of events in the District Court did not provide an opportunity to address the sovereign immunity issue. The case was filed on November 3, 1982 and a temporary restraining order was issued on the same day. A hearing on the plaintiff's motion for a *preliminary* injunction originally was scheduled for November 15, 1982, but later was postponed until December 14. The Court issued a *permanent* injunction on December 29, 1982, followed by its Memorandum Opinion on January 26, 1983. Plaintiffs Sage and Not Afraid filed their notice of appeal on January 28, 1983. See J.A. xiii-xvii; Pet. App. 16a-17a.

On January 14, 1983, the Crow Tribe and the tribal defendants filed a motion to reconsider the Court's December 29, 1982 Order in which they alleged that the District Court lacked jurisdiction over the Crow Tribal Council, the Crow Tribal Court and their respective members. In that same document, the Crow defendants asked leave to file a Memorandum addressing these issues after the issuance of the forthcoming Opinion of the Court to which reference was made in the December 29, 1982 Injunction. Tribe's Ex. Record 28. But the opportunity to consider those matters was lost once Sage's notice of appeal was filed two days after the issuance of the District Court's January 26, 1983 Memorandum Opinion.

[5] Of course, under *Ex Parte Young,* such suits are generally limited only to prospective judicial remedies. Edelman v. Jordan, 415 U.S. 651 (1974).

applied the same rule to suits against tribal officials. *Santa Clara Pueblo v. Martinez, supra,* 436 U.S. at 59. *See also, Puyallup Tribe v. Washington Dept. of Game, supra,* 433 U.S. at 171-172. In the circumstances presented here, however, that rule does not permit this case to proceed against any of the tribal respondents officials or entities.

There is no basis to allow suit against the Crow Tribal Chairman, Donald A. Stewart, Sr., or against two of the three Judges of the Crow Tribal Court, Glen Birdinground and Ira Lefthand, because these three officials did not participate in any of the actions challenged by the petitioners. As stated in *Ex Parte Young, supra,* 209 U.S. at 157:

> In making an officer of the state a party defendant in a lawsuit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as representative of the state, and thereby attempting to make the state a party.

The Crow Tribal Council, which, as previously noted (*supra* at 8 n.3), consists of all adult members of the Crow Tribe and represents, acts and speaks for the Crow Tribe, enacted the ordinance which established the Crow Tribal Court. J.A. 1-4. The Council's stated intent was to establish tribal courts to exercise the jurisdictional authority over the Crow Reservation that has not been foreclosed by acts of the United States Congress. J.A. 2. The Council has not had anything to do with the lawsuit between Sage and the School District and has not taken, or threatened, or been directed to take, any actions which could appropriately be enjoined. Consequently, the Crow

Tribal Council is not a proper party to the suit initiated by National Farmers and the School District.

The only individually named tribal official who had anything to do with the actions challenged by the petitioners is the Tribal Court Judge who signed the default judgment and other orders of the Crow Tribal Court, Judge Eddie Roundface. *See* Br. in Opp. App. 1a-15a. But the doctrine of *Ex Parte Young, supra,* does not "include the power to restrain a court from acting in any case brought before it." *Ex Parte Young, supra,* 209 U.S. at 163. As further stated in that landmark decision:

> The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction, is plain, and no power to do the latter exists because of a power to do the former.

Ibid. Accord, Donovan v. Dallas, 377 U.S. 408, 412-413 (1964), quoted *infra* at 15-16. *See also, General Atomic Co. v. Feller,* 434 U.S. 12 (1977) (per curiam); *Juidice v. Vail,* 430 U.S. 327, 335-336 (1977); *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 599-604 (1975). Accordingly, sovereign immunity precludes maintenance of this suit against Judge Roundface or the Crow Tribal Court.

The Crow Tribe and all of the Crow tribal officials and entities therefore must be dismissed as parties to this suit. However, dismissal of the Crow respondents does not automatically require dismissal of the action because the Tribal Court plaintiffs, Sage and Not Afraid, were joined as defendants in the Federal Court suit and are respondents before this Court. The additional questions that

must be addressed in this setting are whether the action challenging the Tribal Court's jurisdiction against the two private plaintiffs in the Tribal Court suit states a claim for relief that can be brought before the Federal Court and, if so, whether it is appropriate for the Federal Court to consider that claim under the circumstances of this case.

The position of the Crow Tribe is that the Federal District Court clearly erred in entertaining this suit for the reasons expressed by Judge Wright in his concurring opinion (Pet. App. 11a-13a), as amplified in Part II of this Brief. This case, with or without the Crow tribal officials and entities, is not an appropriate vehicle for addressing the abstract question of whether federal courts ever can enjoin ongoing tribal court proceedings on the grounds that the tribal court exceeded the bounds of its jurisdiction as defined by federal law. If, however, these federal court jurisdictional issues are decided in favor of the petitioners, this case should be remanded for consideration of an issue arising from the Tribe's immunity from suit which was not addressed by either the District Court or the Court of Appeals: "whether in equity and good conscience the [federal] action should proceed among the [remaining] parties, or should be dismissed" because the Crow Tribe and the tribal entities and officials are regarded as indispensible. *See* F.R.Civ. P. Rule 19(b); *Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102 (1968). *Cf. Patsy v. Florida Board of Regents,* 457 U.S. 496, 415 n.19 (1982) (leaving the immunity issue for consideration on remand).

II. The Federal District Court Should Not Have Entertained The Suit Challenging The Crow Tribal Court's Jurisdiction Over The Tort Suit.[6]

This case, which has turned into a procedural and jurisdictional nightmare, began simply enough. A minor member of the Crow Tribe who lives on the Crow Reservation was hit by a motorcycle on school grounds within the Crow Indian Reservation. His guardian, who is also a tribal member living on the Reservation, consulted with a local lawyer and then did the natural and logical thing: she filed suit in the local court of general civil jurisdiction, the Crow Tribal Court, *see* J.A.1, alleging that the accident was the result of the maintenance of unsafe conditions at the school and inadequate supervision by school authorities. After that, there was some confusion owing to the failure of the School Board Chairman to notify anyone else that he had been served with process or that the suit had been brought.[7] That kind of occurrence is not infrequent. In due course, the failure to respond to the Court's summons resulted in a predictable action, the entry of a default judgment. The School District and its insurer received actual notice of the default judgment in

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[6] In the event that this Court agrees with the argument in Part I of this Brief and dismisses the Crow Tribe and the tribal entities and officials owing to their immunity from suit, Parts II and III should be deemed to be a Brief by the Crow Tribe as amicus curiae. The Crow Tribe obviously has a significant interest in the outcome of the issues addressed in Parts II and III even if it is not a party to the case. Since the Crow Tribal Court and its judges have not been afforded the opportunity to address or rule on the issues briefed in Parts II and III, the arguments presented in those sections do not necessarily state the position of the tribal court or its judges.

[7] There is no claim that the School District was not properly served.

ample time to avail themselves of the opportunity to set it aside under the applicable Tribal Court rule. J.A. 17; Pet. App. 16a. Up to this point, nothing unusual or extraordinary had occurred.

Then, instead of pursuing its readily available Tribal Court remedies, the defendant in the Tribal Court suit invoked the jurisdiction of the Federal District Court claiming, *inter alia,* that the Crow Tribal Court lacked authority to resolve the tort claim that arose on the Crow Reservation and involved a tribal member. That is where the confusion and the trouble began. Under well-established principles governing the relationship between courts, the federal court should not have entertained the suit. Rather, as all three Ninth Circuit judges agreed, the "proper forum for [determining the scope of tribal court jurisdiction], at least in the first instance, is not a federal court but a tribal court." Pet. App. 7a, 11a-12a. Where, as here, a tribal court has simply asserted jurisdiction over a suit brought by a tribal member with respect to an accident that took place within the confines of the Reservation and the tribal court defendants never even pursued, no less exhausted, *any* tribal court remedies, federal court intervention clearly is inappropriate. Pet. App. 11a-13a (Wright, J. concurring).

Judge Wright's concurring opinion properly relies on the well-established doctrine requiring the pursuit and exhaustion of remedies available in one forum before invoking the jurisdiction of another forum in connection with the same controversy.

> Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently

> and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.

Weinberger v. Salfi, 422 U.S. 749, 765 (1975). All of these considerations counsel strongly against federal courts entertaining suits challenging the jurisdiction of tribal courts before those issues even have been presented to the tribal courts. Judge Wright's conclusion is also bolstered by fundamental principles governing the relationship between the courts of different sovereigns operative within the federal system as well as by the decisions of this Court giving effect to Congress' policy of furthering tribal self-government and protecting the role of tribal courts in resolving civil disputes affecting important personal and property interests of both Indians and non-Indians.

"Early in the history of our country, a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. That rule has continued substantially unchanged to this time." *Donovan v. Dallas,* 377 U.S. 408, 412 (1964). The rationale for that rule was stated in *Peck v. Jenness,* 7 How. (48 U.S.) 612, 625 (1849), and partially repeated in *Donovan v. Dallas, supra:*

> . . . where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but in necessity. For if we may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one if they dare to proceed in the other . . . The fact, therefore, that an injunction issues only to the parties before

> the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum. *See also, Ex Parte Young,* quoted *supra* at 11.[8]

Courts are more reluctant to interfere with judicial proceedings than they are to enjoin the actions of executive officials. *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 603-604 (1975). This common sense principle is embodied in statutory form in 28 U.S.C. § 2283. *See* n.8 *supra.* It has been applied in a variety of settings to prevent disruption of civil or criminal justice systems and to avoid the waste attendant upon duplicative legal proceedings. It manifests a policy of comity and mutual respect between the courts of different sovereigns within an overall federal system. *See Webb v. Webb,* 451 U.S. 493 (1981); *Trainor v. Hernandez,* 431 U.S. 434 (1977); *Juidice v. Vail,* 430 U.S. 327 (1972); *Huffman v. Pursue Ltd.,* 420 U.S. 592, 603, 604 (1975); *Steffel v. Thompson,* 415 U.S. 492, 462 (1974); *Younger v. Harris,* 401 U.S. 37 (1971). As stated in *Huffman v. Pursue, Ltd., supra,* 420 U.S. at 604:

> . . . interference with a state judicial proceeding prevents the state not only from effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent

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[8] The one exception to the general rule noted in Donovan v. Dallas, *supra,* is for cases in which one court has obtained custody over property through in rem or quasi in rem proceedings. In that situation, the court with such custody has exclusive jurisdiction to proceed. 377 U.S. at 412. Congress has also permitted federal courts to enjoin proceedings in state courts where it is found to be necessary to aid the federal court's jurisdiction, to protect or effectuate its judgments, or as expressly authorized by statute. 28 U.S.C. § 2283. None of those circumstances is present here.

> to vindicate any constitutional objections interposed against those policies.

The Court of Appeals therefore was clearly correct (Pet. App. 5a-7a) in drawing a distinction between federal court review of challenges to adjudicatory, as opposed to regulatory, jurisdiction and in applying more restrictive standards to suits seeking to enjoin judicial proceedings. *See, e.g., Middlesex Ethics Comm. v. Garden State Bar Ass'n.,* 457 U.S. 423, 431 (1982) ("*Younger v. Harris,* [401 U.S. 37 (1971)], and its progeny espouse a strong federal policy against federal court interference with pending state judicial proceedings absent extraordinary circumstances"); *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 297 (1970) ("Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy.")

The institutions of tribal governments, especially tribal courts, are entitled to no less respect. Putting aside for a moment the limitations on their powers, there is no doubt that "[t]he cases in this Court have consistently guarded the authority of Indian governments over their reservations." *Williams v. Lee,* 358 U.S. 217, 223 (1959). The Court has repeatedly emphasized and given effect to "Congress' objective of furthering tribal self-government . . ." *New Mexico v. Mescalero Apache Tribe,* 103 S.Ct. 2378 (1983). *See also, Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 138 n.5 (1982); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143-144 and n.10 (1980); *Morton v. Mancari,* 417 U.S. 535, 551 (1974). In particular, "[t]ribal courts have repeatedly been recognized as

appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 65 (1978). The crucial role of tribal courts as well as other tribal institutions in resolving civil disputes arising on Indian reservations has carefully and consistently been recognized and protected. *Santa Clara Pueblo v. Martinez, supra,* 436 U.S. at 59-60; *Fisher v. District Court,* 424 U.S. 382 (1976) (per curiam); *United States v. Mazurie,* 419 U.S. 544, 548 (1975); *Kennerly v. District Court,* 400 U.S. 423 (1971) (per curiam) *Williams v. Lee,* 358 U.S. 217 (1959).

The decision in *Santa Clara Pueblo v. Martinez, supra,* epitomizes these principles. There, despite the existence of a federal statute, the Indian Civil Rights Act of 1968 (ICRA), which was intended in part to strengthen the position of individuals against tribes, this Court held that the ICRA does not authorize implied federal court actions against tribes or tribal officials for alleged violations of the Act.[9] In reaching that conclusion, this Court relied on "the congressional goal of protecting tribal self-government," the serious financial burden that defending federal court suits would impose on "already 'financially disadvantaged' tribes," and "the intrusive effect of federal ju-

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[9] Prior to the *Santa Clara* decision, lower federal courts were reviewing complaints brought against tribal institutions. To minimize interference with those institutions, those courts had imposed the requirement that tribal remedies must be exhausted prior to the filing of the federal suit. *See* Howlett v. Salish and Kootenai Tribes, 529 F.2d 233, 239 (9th Cir. 1976); Means v. Wilson, 522 F.2d 833 (8th Cir. 1975), *cert. denied,* 424 U.S. 958 (1976); Janis v. Wilson, 521 F.2d 724, 727 (8th Cir. 1975); McCurdy v. Steele, 506 F.2d 653, 656 (10th Cir. 1975); O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140 (8th Cir. 1973). *See also,* Pet. App. 12a-13a (Wright, J., concurring).

dicial review upon tribal self-government." 436 U.S. at 59-60, 65, 70. Of particular importance to this case, *Santa Clara* bespeaks a policy explicitly recognizing that vital claims predicated on federal law are properly raised and finally decided in tribal courts and other tribal institutions. 436 U.S. at 65-66. *Cf. Webb v. Webb,* 451 U.S. 493, 499-501 (1981) (Supreme Court will not consider claim arising under federal law that has not properly been presented to the state courts.)[10] All of these considerations apply with special force to preclude the kind of direct interference with an ongoing tribal court proceeding that is exemplified by the injunction issued by the Federal District Court against the Crow Tribal Court and its judges.

This consistent line of decisions in the Court's Indian cases leaves no doubt that potential interference by federal courts in ongoing tribal court proceedings should be governed by principles no less restrictive than those that this Court has applied to the relationship between state and federal courts. Absent extraordinary circumstances, federal courts should not entertain suits seeking to interfere with or restrain suits pending before tribal courts. For the reasons so well stated by Judge Wright in his concurring opinion, Pet. App. 11a-13a, such interference is especially unwarranted where the authority of the tribal courts has been ignored and circumvented, and available tribal court remedies have not ever been pursued, no less exhausted.

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[10] This case, in its current posture, does not present the issue of whether, or to what extent, federal questions decided by tribal courts may be reviewed by this Court or other federal courts following the issuance of final tribal court judgments and the exhaustion of tribal court remedies. *See Santa Clara, supra,* 436 U.S. at 65 n.21.

In this case, there are no extraordinary circumstances. The Crow Tribal Court is the natural and logical forum for the resolution of claims by members of the Crow Tribe predicated on events taking place within the Reservation. This is not an instance, for example, in which a tribal court assumed jurisdiction over a suit between two non-members or involving off-reservation conduct. *See* Pet. App. 12a (Wright, J. concurring). Nor is there any indication that the Tribal Court proceeding was motivated by a desire to harass or was conducted in bad faith or pursuant to a facially and obviously invalid tribal law. *Cf. Juidice v. Vail, supra,* 430 U.S. at 338. At the time that the federal court's jurisdiction was invoked, there was no emergency or immediate threat of irreparable harm. No writs of execution had been issued; no property had been seized; no public sale had been scheduled. The defendant in the Tribal Court suit had not even attempted to exhaust any of the tribal court remedies that were available to it and had exhibited complete disregard for a functioning court of a recognized sovereign. Pet. App. 13a (Wright, J. concurring). *Cf. Cowan v. Rosebud Sioux Tribe,* 404 F. Supp. 1338, 1340, 1341 (D.S.D., 1975). There was ample opportunity for the tribal court defendant to move to set aside the default judgment and to present any federal claims that it might have to the tribal court including contentions that the tribal court lacked jurisdiction or that its procedures did not satisfy due process requirements. Pet. App. 13a (Wright, J. concurring). *Cf. Juidice v. Vail, supra,* 430 U.S. at 337 and n.14. Under these conditions, all of which were known to the District Court at the time its permanent injunction was issued, the federal court suit should have been dismissed.

This case does not present an appropriate occasion for speculating on the precise circumstances under which

federal court intervention in tribal court proceedings might be appropriate. For purposes of this case, it can be assumed *arguendo* that federal courts can enjoin *parties* to tribal court actions (not tribal courts or tribal judges) when tribal court remedies have been exhausted and the requirements of 28 U.S.C. § 2283 are satisfied or

> in those cases where the District Court properly finds that the [tribal] proceeding is motivated by a desire to harass or is conducted in bad faith, or where the challenged statute is "flagrantly and patently violative of express constitutional [or federal statutory] prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."

Juidice v. Vail, supra, 430 U.S. at 338, *quoting Huffman v. Pursue, Ltd., supra,* 420 U.S. at 611. Plainly, this is not such a case.

III. The Crow Tribal Court Has Jurisdiction Over The Tort Suit Brought By Tribal Members Against The School District With Respect To An Accident Occurring Within The Crow Reservation.

A. Indian Tribes Retain the Inherent Sovereign Power To Adjudicate Civil Causes of Action Arising Within Reservations and Involving Tribal Members.

Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory." *New Mexico v. Mescalero Apache Tribe,* 103 S.Ct. 2378, 2385 (1983) *(Mescalero Apache)*; *United States v. Mazurie,* 419 U.S. 544, 557 (1975). Tribes retain their inherent tribal powers except to the extent that such powers have been divested by federal law or by necessary implication of their dependent status. *Mescalero Apache, supra,* 103 S.Ct. at 2385; *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 137 (1982) (*Merrion*); *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S.

134, 152 (1980) (*Colville*). These powers include the exercise of civil jurisdiction over the conduct and activities of non-Indians occurring within boundaries of Indian reservations. *Mescalero Apache, supra,* 103 S.Ct. at 2384-2387; *Merrion, supra,* 455 U.S. at 137, 144 and 145 nn.11 and 12 (approving *Buster v. Wright,* 135 F. 947 (8th Cir. 1905), *appeal dismissed,* 203 U.S. 599 (1906)); *Colville, supra,* 447 U.S. at 152-153. *See also, Babbit Ford, Inc. v. Navajo Indian Tribe,* 710 F.2d 587 (9th Cir. 1983), *cert. denied,* — U.S. —; *Cardin v. De La Cruz,* 671 F.2d 363 (9th Cir. 1982), *cert. denied,* 459 U.S. 967; *Knight v. Shoshone & Arapahoe Tribe,* 670 F.2d 900 (10th Cir. 1982); *Iron Crow v. Oglala Sioux Tribe,* 231 F.2d 89 (8th Cir. 1956).

For tribal powers to be abrogated or diminished by federal statutes, there must be "clear indications of legislative intent." *Merrion, supra,* 455 U.S. at 149, 152. Divestiture of tribal powers by virtue of the tribes' dependent status occurs

> in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights. . . [I]t must be remembered that tribal sovereignty is dependent on, and subordinated to, only the Federal Government, not the States.

Colville, supra, 447 U.S. at 153-154. Accord, *Mescalero Apache, supra,* 103 S.Ct. at 2385; *Merrion, supra,* 455 U.S. at 147 n.13.

One of the hallmarks of any organized and cohesive society is a system for resolving disputes in an orderly and predictable manner. "Without such a 'legal system,'

social organization and cohesion are virtually impossible. . ." *Boddie v. Connecticut,* 401 U.S. 371, 374 (1971). The power to establish a mechanism or system for the resolution of civil disputes arising within the territory of a sovereign and affecting its members unquestionably is an essential and inherent attribute of Indian sovereignty "because it is a necessary instrument of self-government and territorial management." *Merrion, supra,* 455 U.S. at 137. *See Santa Clara Pueblo v. Martinez, supra,* 436 U.S. at 59-60, 65; *Williams v. Lee,* 358 U.S. 217 (1959)[11]

There is no serious claim by the petitioners that the power of the Crow Tribe to establish such a judicial system has been abrogated or limited by any Act of Congress.[12] Nor could that power be divested by virtue of the Tribe's dependent status. The exercise of judicial authority by Crow courts over civil causes of action arising within the Reservation and affecting tribal members is not in any way inconsistent with the overriding interests of the federal government. Most such disputes, including the present one, would not even be cognizable in the federal courts and there is no federal interest that is the least bit threatened by the exercise of tribal court jurisdiction in such matters. *See Santa Clara Pueblo v. Martinez, supra,* 436 U.S. at 59-60, 65; *Williams v. Lee, supra.*

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[11] This aspect of tribal sovereignty has been recognized by all three branches of the federal government. See Brief of Amici Assiniboine and Sioux Tribes, et al. at 5-14; Brief of United States at 14-18.

[12] The argument of the State of Washington as amicus curiae (Br. at 8-10) based on Article 1 of the Second Treaty of Fort Laramie, 15 Stat. 649 (1868), is foreclosed by this Court's decisions in Kennerly v. District Court, 400 U.S. 423 (1971); and Williams v. Lee, 358 U.S. 217 (1959). See Brief of United States at 14 n.5; Brief of Amici Assiniboine and Sioux Tribes, et al. at 12-13.

So even if it is assumed *arguendo* that the interests of the State of Montana are implicated by the assumption of such jurisdiction, that would not make any difference because "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Colville, supra,* 447 U.S. at 154.

The petitioners' entire case and the District Court's holding are predicated on their reading of *Montana v. United States,* 450 U.S. 544 (1981). They have not made any effort to integrate *Montana* with prior or subsequent decisions or with the analytic framework the Court has employed in other cases addressing tribal sovereignty issues such as *Mescalero Apache, Merrion* and *Colville.*[13] While there may be some tension between *Montana* on the one hand and *Mescalero Apache, Merrion* and *Colville* on the other, *see, e.g. Confederated Salish & Kootenai Tribes v. Namen,* 665 F.2d 951, 963 (9th Cir. 1982), *cert. denied,* 459 U.S. 977, a careful analysis of *Montana* reveals that it is predicated on the absence of a nexus between the conduct of non-Indians hunting or fishing on non-Indian owned lands within the reservation and any significant Indian interest. This point is stressed several times throughout the opinion. *See* 450 U.S. at 558 n.6, 564 and n.13, 566 and n.16. *Montana* also expressly stated that tribes have

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[13] Their approach is exemplified by the District Court's decision stating that Williams v. Lee, 358 U.S. 217 (1959), is regarded as "old law," presumably because it was thought to be rendered obsolete by *Montana*. Pet. App. 23a-24a. But *Williams* was cited three times in *Montana* itself, 450 U.S. at 564, 565, 566, without any hint that it was being overruled sub silentio. It has been cited and followed repeatedly in this Court's decision, most recently in Three Affiliated Tribes v. Wold Engineering, 104 S.Ct. 2267 (1984). *See also,* e.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 n.9, 142 (1980).

inherent power "to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." 450 U.S. at 566.

Properly understood, *Montana* stands for the proposition that there must be some relationship, connection, or nexus between the reservation-based activities of non-Indians and a significant Indian interest in order for those non-Indian activities to be subject to tribal jurisdiction. In the vernacular of *Williams v. Lee, supra,* 358 U.S. at 219-220, *Montana* fits into the category of cases "where essential tribal relations were not involved and . . . where the rights of Indians would not be jeopardized, [and therefore] the state action did not infringe on the right of reservation Indians to make their own laws and be ruled by them." *See also, Colville, supra,* 447 U.S. at 152-53 ("Included in this [retained] tribal [sovereign] power is a broad measure of civil jurisdiction over the activities of non-Indians on Indian Reservation lands in which the tribes have a significant interest.") Indeed, that is precisely how *Montana* was construed and limited by a unanimous Court in *Mescalero Apache, supra,* 103 S.Ct. at 2384 and n.12. *Mescalero Apache* also expressly reaffirmed the *Colville* holding that "'tribes retain any aspect of their sovereignty not inconsistent with the overriding interests of the National Government.'" 103 S.Ct. at 2385.

Viewed in the light shed by the Court's other Indian opinions, there is no doubt that *Montana* fully supports the jurisdiction of the Crow Tribal Court over reservation-based claims asserted by tribal members. Sage's suit most assuredly involves essential tribal interests. Unfortunately, accidents occur and a society must devise a system of resolving the disputes to which they give rise.

Such a system is close to, if not at, the core of a society's "political integrity." *Montana, supra,* 450 U.S. at 566. *See, Santa Clara Pueblo v. Martinez, supra,* 436 U.S. at 59-60, 65; *Williams v. Lee, supra.* As stated in *Boddie v. Connecticut, supra,* 401 U.S. at 374:

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitely settle their differences in an orderly predictable manner. . . [W]ith the ability to seek regularized resolution of conflicts individuals are capable of independent action that enables them to strive for achievement without the anxieties that would beset them in a disorganized society.

Accord, Nevada v. Hall, 440 U.S. 410, 424 (1979) (emphasizing a state's substantial interest in providing full protection to those who are injured on its highways through the negligence of both residents and nonresidents); Collins, "Implied Limitations on the Jurisdiction of Indian Tribes," 54 Wash. L. Rev. 470, 518 (1979).

In this case, there are vital ties between essential tribal interests and the Crow Tribal Court's jurisdiction over Sage's tort claim. Most importantly, Sage and his guardian, Not Afraid, are tribal members and the accident took place within the Crow Tribe's political boundaries. Denying the Crow Tribal Court jurisdiction over matters arising within the Reservation and affecting its members indisputably "undermine[s] the authority of the tribal courts . . . and hence . . . infringe[s] on the right of the Indians to govern themselves." *Santa Clara Pueblo v. Martinez, supra,* 436 U.S. at 59, citing and quoting *Fisher v. District Court,* 424 U.S. 382, 387-388 (1976); and *Williams v. Lee, supra,* 358 U.S. at 223. *See also,*

McClanahan v. Arizona Tax Comm'n., 411 U.S. 164, 179 (1973).[14]

Moreover, the Crow Tribe has an especially significant interest in the dispute between Sage and the School District. Eighty-five percent of the students attending the Lodge Grass School are Crow. The Lodge Grass School Board consists of nine members of whom five are Crow Tribal members. *See supra* at 1-2. The Tribal Court complaint alleges that the accident was caused by the School District's negligence in maintaining the school parking lot in an unsafe condition and in not providing adequate supervision for its students during school hours. The Tribe surely has an essential interest in the health, welfare and safety of its children and in the standard of care exercised by those entrusted with their education. *See* 25 U.S.C. § 1901(3). *See also, infra* at 29-30.

To summarize, the Crow Tribal Court has jurisdiction over Sage's tort claim because the exercise of such juris-

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[14] This case would be more difficult if the issue were whether the exercise of concurrent state court jurisdiction over reservation-based tort claims involving tribal members infringes on essential tribal interests. *See* Williams v. Lee, *supra* (upholding *exclusive* jurisdiction of tribal courts over a reservation-based contract action brought by a non-Indian against an Indian). *See also,* Santa Clara Pueblo v. Martinez, *supra,* 436 U.S. at 59 and n.9 ("subjecting a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves . . . may undermine the authority of the tribal court . . . and hence . . . infringe on the right of the Indians to govern themselves."); *State ex. rel. Flammond v. Flammond,* — Mont. —, 621 P.2d 471 (1980). The answer to the question posed by concurrent state court jurisdiction may depend upon whether the Indian party appears voluntarily or involuntarily in state court. *See* Three Affiliated Tribes v. Wold Engineering, 104 S.Ct. 2267 (1984). That issue is not presented here where the only question is whether the tribal court properly can exercise any jurisdiction, be it concurrent or exclusive, over such suits.

diction implicates essential tribal interests and because authority to adjudicate reservation-based civil disputes involving tribal members is part of the Crow Tribe's retained, inherent sovereignty which has not been divested by any federal law or lost by virtue of the Tribe's dependent status. We next consider petitioner's claims that the Tribal Court lacks jurisdiction over Sage's suit because of the nature of the School District and/or the title status of the school grounds.

B. The Crow Tribal Court is Not Deprived of Its Jurisdiction by the Nature of the School District or the Title Status of the School Grounds.

There are two predicates underlying the petitioners' argument, the alleged "non-Indian" nature of the School District and the fee status of the lands on which the Lodge Grass School is located. Neither of these factors should have any bearing on the Tribal Court's jurisdiction over Sage's suit. To the extent that it has any relevance at all, the nature of the School District supports the Tribal Court's jurisdiction.

Although the School District is organized pursuant to State law, it is, in reality, predominantly Crow. As previously noted, five of the nine members of the elected school board are members of the Crow Tribe as are 85 percent of the children attending the school. Many of the teachers and other school employees also are Crow members. The extensive links between the School District and the Crow Tribe differentiate the School District from the private, individual, non-Indian hunters and fishers involved in the *Montana* litigation. On a spectrum with Indians on one end and non-Indians on the other, the School District is somewhere in between, a hybrid, but closer to

the Indian side. *Cf. United States v. Mission Golf Course,* 548 F. Supp. 1177, 1181, 1182 (D.S.D. 1982), *aff'd* 716 F.2d 907 (8th Cir. 1983) *cert. denied,* — U.S. —.

In similar situations, this Court has looked to the substance of an organization or entity, not its form, in deciding jurisdictional questions. In *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 157 n.13 (1973), the Court stated that "the question of tax immunity cannot be made to turn on the particular form in which the Tribe chooses to conduct its business." Illustrating that point, in *Ramah Navajo School Board v. Bureau of Revenue,* 458 U.S. 832 (1982), the Court as well as the parties treated the Indian school as a tribal entity even though it was incorporated under state law. *See also, Eastern Navajo Industries, Inc. v. Bureau of Revenue,* 552 P.2d 805 (N.M. App. 1976), *cert. denied,* 430 U.S. 959 (corporation formed under state law in which Indians own 51 percent of its stock held to be an Indian entity for purposes of determining the validity of a state tax). Similarly, in this case, the most significant aspects of the School District for jurisdictional purposes are that it is controlled by Crow Indians, that Crow Indians constitute the vast majority of the children it educates, and that the education of Crow children is an extremely important governmental matter both to the Crow Tribe and to the federal government. *See Ramah Navajo School Board v. Bureau of Revenue, supra.* In these circumstances, the nominal form of the organization and its formal designation as "Indian" or "non-Indian" are immaterial.[15]

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[15] This point is underscored in another way by *Mescalero Apache, supra, Ramah Navajo, supra,* and White Mountain

(Continued on next page)

Moreover, the School District avails itself of significant Crow governmental services. When there are disturbances or law enforcement problems at the Lodge Grass School, the Crow police are called upon to respond. Fire protection is provided by the Crow Fire Department. Truancy and delinquency matters are handled by the Crow Juvenile Court. The School District should not be allowed to take full advantage of Crow governmental services provided by the Tribe or the federal government while at the same time maintaining an immunity from Crow jurisdiction. *See Merrion, supra,* 455 U.S. at 137-138. (Oil companies held subject to tribal severance tax because, *inter alia,* they benefit from "the provision of police protection and other [tribal] governmental services, as well as from 'the advantages of a civilized society' that are assured by the existence of tribal government.")

Nor is there any merit to the suggestion that the School District's status as an agency of the State deprives the Crow Tribal Court of jurisdiction over Sage's suit. To begin with, any such defense must be raised in the first instance in the Crow Tribal Court. Sovereign immunity has never been employed in a way that would permit an entity claiming that defense to avoid appearing and filing an answer in the forum in which it is sued. *See e.g., Nevada v. Hall,* 440 U.S. 410 (1979). Second, though the

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Apache Tribe v. Bracker, 448 U.S. 136 (1980). In all three of those cases, totally *non-Indian* corporations and individuals were held to be immune from some forms of *state* jurisdiction owing to their relationships with Indians. Similarly, in this case, the School District's significant contacts with Crow Indians renders it subject to the jurisdiction of the Crow Tribal Court.

School District is a political subdivision of Montana, it is not entitled to sovereign immunity under the Eleventh Amendment. *Mt. Healthy City School District v. Doyle,* 429 U.S. 274, 280 (1977). *See also,* Mont. Const. Art. II, §18; *Patsy v. Florida Bd. of Regents,* 457 U.S. 496, 519 n.* (1982) (White, J. concurring). Third, even if the School District were an arm of the State, it would become subject to the jurisdiction of another sovereign by conducting business within the other sovereign's territory. *Nevada v. Hall,* 440 U.S. 410 (1979). States and their agents should not be treated any differently than Indian tribes which generally become subject to state jurisdiction when they venture off their reservations. *Mescalero Apache, supra,* 103 S.Ct. at 2387 n.18; *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148-149 (1973). Reason and logic dictate that this principle should be reciprocal.

With regard to petitioners' reliance on its alleged fee title to the school land,[16] it is difficult to understand why that should be at all relevant in the context of this case.

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[16] When this case was before the District Court at the preliminary injunction hearing, see *supra* at 9 n.4, all parties apparently assumed that the Lodge Grass School was located on lands that were conveyed to the State pursuant to Section 16 of the 1920 Crow Allotment Act, 41 Stat. 756. See, Pet. App. 15a, 19a. It now appears, however, that a fee patent for the land was originally issued in 1911 and that it was sold to the School District in 1918. See Brief for Respondent Not Afraid at — n.1 and Part IIG. That is odd because there may not have been a legal mechanism for Crow lands to be taken out of trust and conveyed to non-Indians prior to the enactment of the Crow Allotment Act in 1920.

If, contrary to the Tribe's position, the title status of the school grounds is deemed at all relevant to the propriety of the Crow Tribal Court's jurisdiction over Sage's tort claim, this case should be remanded back to the District Court for further consideration of the title issue.

which does not directly involve property or property rights. The trust or fee status of property undoubtedly is significant for jurisdictional purposes when the Indian title to the land supplies the required nexus between the Indian interest and the activity that is subject to tribal jurisdiction. *See, e.g., Mescalero Apache, supra,* 103 S.Ct. at 2384; *Merrion, supra,* 455 U.S. at 138, 144-148; *Cohen's Handbook of Federal Indian Law* 257 (1982). But why would it, or should it, make any difference if the Lodge Grass School were located, for example, on trust land leased from the Crow Tribe or a Crow tribal member? *See* 25 U.S.C. § 415. Unlike the situation in *Montana,* where non-Indian hunters and fishers would not have been able to enter the Reservation to hunt or fish without the landowners' permission, nothing in this case would have been any different if the accident had taken place on land that happened to be held in trust. Here, the far more important jurisdictional factors are that the accident occurred on school grounds located within the Crow Tribe's political jurisdiction, *see Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973), and that the State of Montana voluntarily agreed to permit Crow Indian children "to attend the public schools of [the] state on the same conditions as the children of white citizens of said state" in return for which the State received the school land sections within the Crow Reservation that previously had been owned by the Crow Tribe. *See* Section 16 of the 1920 Crow Allotment Act, 41 Stat. 756. *Cf. Montana. supra,* 450 U.S. at 565 (tribes may regulate the activities of nonmembers who enter into consensual relationships with the tribe or its members).

Moreover, as this Court noted in *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 478 (1976), "Con-

gress by its more modern legislation has evinced a clear intent to eschew any such 'checkerboard' approach within an existing Indian reservation, and our cases have in turn followed Congress' lead in this area." *See particularly,* 18 U.S.C. § 1151 (specifically defining "Indian country as, *inter alia,* "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation"); *DeCoteau v. District County Court,* 420 U.S. 425, 427 n.2 (1975). Here, as in *Moe, supra,* 425 U.S. at 478, the Court should reject the "impractical pattern of checkerboard jurisdiction" within Indian reservations that would be the inevitable consequence of upholding the petitioners' position.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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March 1985

Supreme Court, U.S.
FILED
APR 9 1985
ALEXANDER L. STEVAS
CLERK

No. 84-320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES; and LODGE GRASS SCHOOL DISTRICT NO. 27,
Petitioners,

v.

CROW TRIBE OF INDIANS; LEROY SAGE, a minor; FLORA NOT AFRAID, his guardian; THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; EDDIE ROUNDFACE, GLEN BIRDINGROUND, and IRA LEFT HAND, Judges of the Tribal Court of the Crow Indian Reservation; CROW INDIAN TRIBAL COUNCIL; and DONALD STUART, Chairman of the Crow Indian Tribal Council,
Respondents.

On Writ of the Certiorari to the United States Court of Appeals for The Ninth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether there is a federal claim for relief against Indian Tribal Governments that unlawfully assert civil jurisdiction over non-Indians.

2. Whether the Tribal Court of the Crow Indian reservation has jurisdiction over claims that involve the State of Montana (or its subdivisions), that arise on state owned land, and that occur in connection with activities that are compelled or encouraged by state and federal law or policy.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii, iv
PRELIMINARY STATEMENT	1
ARGUMENT	1
I. NO SUBSTANTIAL ARGUMENT HAS BEEN MADE BY THE RESPONDENTS OR THEIR *AMICI CURIAE* TO SUPPORT THE COURT OF APPEALS' REFUSAL TO FIND FEDERAL QUESTION JURISDICTION	1
II. EXHAUSTION OF ALLEGED TRIBAL COURT REMEDIES SHOULD NOT BE REQUIRED UNDER THE CIRCUMSTANCES HEREIN	4
III. THE CROW RESPONDENTS' CLAIM OF SOVEREIGN IMMUNITY IS BOTH ANALYTICALLY FLAWED AND IRRELEVANT	6
IV. THE CROW TRIBE'S INHERENT SOVEREIGNTY RIGHTS DO NOT EXTEND TO ASSERTION OF TRIBAL COURT JURISDICTION OVER PETITIONER SCHOOL DISTRICT UNDER THE FACTS HEREIN	9
A. The Importance of *Montana*	9
B. The Respondents' Arguments	11
1. Attempts to Distinguish *Montana*	11
2. Claimed Adverse Impact on Tribal Governmental Interests	14
3. Sovereign Immunity Considerations	15
4. Executive Branch Recognition of Tribal Court Civil Jurisdiction over Nonmembers	16
CONCLUSION	18

TABLE OF AUTHORITIES

CASES	Page
County of Oneida v. Oneida Indian Nation, 52 U.S.L.W. 4225 (Mar. 4, 1985)	3
Donovan v. Dallas, 377 U.S. 408 (1964)	4
Ex parte Young, 209 U.S. 123 (1907)	8
Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)	4
Juidice v. Vail, 430 U.S. 327 (1977)	4
Milwaukee v. Illinois, 451 U.S. 304 (1981)	3
Montana v. United States, 450 U.S. 544 (1981)	9, 11, 12, 13
Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974)	2
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)	5, 9, 10, 17
Rice v. Rehner, 103 S. Ct. 3291 (1983)	13
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)	4, 7
Snow v. Quinalt Indian Nation, 709 F.2d 1319 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 2655 (1984)	7
Talton v. Mayes, 263 U.S. 376 (1896)	6
Three Affiliated Tribes v. Wold Engineering, 104 S. Ct. 2267 (1984)	15
Williams v. Lee, 358 U.S. 217 (1959)	14
Wheeler v. United States, 435 U.S. 313 (1978)	10
OTHER AUTHORITIES	
Code of Federal Regulations	
25 C.F.R. § 11.22 (1959)	14
25 C.F.R. §§ 11.22, 11.22C (1984)	17
F. Harper & F. James, Law of Torts	
Sections 29.4-29.6 (1956)	15
Federal Rules of Civil Procedure Rule 19(b)	7
General Allotment Act of 1887 24 Stat. 388	13
Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1982)	4

Table of Authorities Continued

	Page
Montana Code Annotated	
Sections 2-9-301 to 2-9-318	15
Section 20-5-108	12
Section 20-6-101(2)	12
Opinions of United States Attorney General	
7 Op. Att'y Gen. 174 (1855)	16
Nonintercourse Act of 1793 1 Stat. 329	3
T. Cooley, Law of Torts Sections 72, 388 (4th ed. 1932)	15
United States Code	
25 U.S.C. §§ 1301-1303 (1982)	4
28 U.S.C. § 1254 (1966)	3
28 U.S.C. § 1257 (1966)	3
28 U.S.C. § 1258 (1966)	3
28 U.S.C. § 1259 (1966)	3
28 U.S.C. § 1331 (1966)	1, 2, 3, 4
28 U.S.C. § 1345 (1976)	2
28 U.S.C. § 1362 (1976)	2

PRELIMINARY STATEMENT

The respondents and the several *amici curiae* urging affirmance of the Court of Appeals decision raise four issues which will be discussed below: (1) Whether federal jurisdiction exists under 28 U.S.C. § 1331 (1966); (2) whether the petitioners were, as a condition precedent to utilizing such jurisdiction, required to have pursued any available tribal court remedies; (3) whether some or all of the Crow respondents are entitled to invoke the sovereign immunity defense; and (4) whether the tribal court had jurisdiction over petitioner Lodge Grass School District No. 27 under the facts herein. Careful analysis establishes that each of these issues must be resolved in the petitioners' favor.

ARGUMENT

I. No Substantial Argument Has Been Made By The Respondents Or Their *Amici Curiae* To Support The Court Of Appeals' Refusal To Find Federal Question Jurisdiction.

Only respondents Sage and Not Afraid, joined by *amici curiae* Salt River Pima-Maricopa Indian Community and Gila River Indian Community, argue that federal question jurisdiction does not exist with respect to the amended complaint. (Sage Br. 5-14; Pima-Maricopa Br. 5-6.) The Crow respondents are silent on this issue although, by arguing that exhaustion of tribal remedies should have preceded resort to federal court, tacitly admit the presence of jurisdiction under 28 U.S.C. § 1331. (Crow Br. 13-21.) *Amicus curiae* United States concedes the existence of federal jurisdiction because "the boundaries of tribal jurisdiction are defined by federal law" and "a non-Indian claiming injury from tribal 'jurisdictional excesses' [thus] states a 'federal question' case under Section 1331." (U.S. Br. 5.) The remaining *amici curiae* supporting affirmance do not

address the federal question issue. (Assiniboine Br. 19 n.18.)[1]

Sage and Not Afraid's analysis of the federal question issue is, at best, a hodgepodge of misapprehensions and analytical *non sequiturs*. They first suggest that federal question jurisdiction does not exist because (1) the petitioners did not attempt to persuade the United States or the Crow Tribe to institute a civil action in federal district court under 28 U.S.C. § 1345 (1976) or 28 U.S.C. § 1362 (1976) and (2) the petitioners could have exhausted tribal court remedies and then sought review by appeal to or certiorari from this Court. Quite obviously, however, whether the United States or the Crow Tribe would have been willing to commence a federal action for the purpose of permitting the petitioners an opportunity to litigate the tribal court jurisdiction issue is—despite the outlandish factual predicate, irrelevant to whether § 1331 jurisdiction exists as to the amended complaint; such jurisdictional determination must instead be based on the nature of the asserted claim. *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 675 (1974). Equally outlandish is the suggestion that the Court may review tribal court decisions as a matter of course; the Court's jurisdiction in such matters is, without question, limited to review of federal, state, certain territorial and

[1]The *amici curiae* brief filed jointly by the Assiniboine and Sioux Tribes of the Fort Peck Reservation, the Cheyenne River Sioux Tribe, Devils Lake Sioux Tribe, Mescalero Apache Tribe, Nez Perce Tribe, Pueblo of Laguna, Seneca Nation of Indians, Standing Rock Sioux Tribe, American Indian Lawyer Training Program, Inc., Association on American Indian Affairs, Inc., National American Indian Court Judges Association, National Indian Justice Center and Northwest Intertribal Court Association will be referred to in the text as the Assiniboine Brief; these *amici curiae* will also be referred to collectively as the Assiniboine.

military court decisions. *See, e.g.*, 28 U.S.C. § § 1254, 1257, 1258 and 1259 (1966).

Sage and Not Afraid next argue federal question jurisdiction herein would render the district court an appellate tribunal for tribal court decisions. Such contention, however, mistakes the thrust of the amended complaint, which is directed to the sole issue of whether the tribal court had jurisdiction to proceed against petitioner School District. The petitioners did not, conversely, request the district court to review the merits of the underlying tort claim. The focused nature of the amended complaint further undercuts Sage and Not Afraid's extravagant assertion that, "[i]f [the petitioners'] interpretation of section 1331 is adopted, every action commencing in a tribal court raising the requisite federal question will be subject to federal injunction which, in effect, will remove the case to federal court." (Sage Br. 13.)

Finally, Sage and Not Afraid's perfunctory nod to the Court of Appeals' refusal to find a valid federal common law claim adds nothing to its reasoning. (Sage Br. 14.) The appeals court's misplaced reliance on *Milwaukee* v. *Illinois*, 451 U.S. 304 (1981), was thoroughly analyzed in the petitioners' principal brief and need not be repeated. (Pet. Br. 8-12.) Moreover, the Court's recent decision in *County of Oneida* v. *Oneida Indian Nation*, 52 U.S.L.W. 4225, 4227-29 (Mar. 4, 1985), concluding that the Oneida Nation could maintain an action under section 1331 based on federal common law for violation of its aboriginal land rights, not only expressly recognized such a claim in an Indian law context but also distinguished *Milwaukee* v. *Illinois*, *supra*, on the basis that subsequent legislation—the Trade Nonintercourse Act of 1793, 1 Stat. 329, did not preempt the federal common law claim. The Court's analysis in *Oneida* is fully consonant with that of the petitioners in their principal brief.

Finally, Sage and Not Afraid make no effort to address the detailed and sophisticated arguments raised in the petitioners' and various *amici curiae* briefs concerning the existence of federal question jurisdiction. Indeed, the absence of any credible effort to support the Court of Appeals decision is, in view of the section 1331 issue's significance to this case and generally, remarkable. It is abundantly clear that the appeals court's *sua sponte* conclusion that federal jurisdiction was lacking must be reversed.

II. Exhaustion Of Alleged Tribal Court Remedies Should Not Be Required Under The Circumstances Herein.

The Crow respondents, Sage and Not Afraid and *amici curiae* Assiniboine argue at length in support of Judge Wright's concurring and dissenting opinion below (Pet. 11a-13a) that the petitioners should have exhausted tribal court remedies before invoking the district court's jurisdiction. (Crow Br. 13-21; Sage Br. 13-24; Assiniboine Br. 19-25.) The United States does not address this issue other than observing vaguely that "[t]he availability of a tribal court remedy perhaps should have cautioned the district court to withhold federal injunctive relief." (U.S. Br. 7.)

Unlike Judge Wright, whose exhaustion analysis derived from decisions involving actions based on the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1982), prior to *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978), the Crow respondents weave an ornate analytical tapestry premised on an identity of policy interests between traditional comity concerns underlying refusals by federal courts to interfere with state court proceedings and the fostering of tribal self-government. *See, e.g., Donovan* v. *Dallas*, 377 U.S. 408 (1964); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975); *Juidice* v. *Vail*, 430 U.S. 327 (1977). While perhaps an initially appealing analogy, it nonetheless confuses basic

notions of federalism with the unique and federally dependent status of tribes.

The substantive question lying at the core of the amended complaint resolves itself on whether the tribal court's assertion of jurisdiction over petitioner School District was inconsistent with the Crow Tribe's dependent status under federal law since, "[u]pon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty." *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978). Where the very existence, and not merely the improper application, of such sovereignty is questioned, resort to exhaustion notions as a matter of comity is manifestly inappropriate. There exists neither logic nor equity in requiring the petitioners to request the Crow tribal court, which clearly has no authority to speak with respect to the allegedly tortious conduct, to rule that it has no such authority. Not only is the possibility of such a ruling, as developed below, the most transparent of legal fictions, but such a requirement also mandates submission to a tribunal which lacks any power to affect petitioner School District's legal interests under the facts herein.[2]

The futility of tribal court exhaustion on the jurisdiction issue is patent. First, the tribal court expressly found jurisdiction over petitioner School District in its October 25, 1982

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[2]The petitioners naturally recognize that a tribal court ruling favorable to their position on the jurisdiction issue would moot this controversy. Nonetheless, the theoretical possibility of such a decision does not support what, in essence, is suggested as a *per se* exhaustion requirement. The undisputed facts unquestionably establish the rhetorical nature of the Crow respondents' claim that tribal court remedies as to this issue are meaningful.

order. Since the facts germane to such a conclusion are undisputed and the issue itself so fundamental as, presumably, to require independent analysis by the tribal court, it is obvious that reconsideration favorable to the School District would not occur. Second, the tribal court judge who entered the order would sit as one of three judges to determine any appeal therefrom. While such a procedure may, because of *Talton* v. *Mayes*, 263 U.S. 376 (1896), and an obviously narrow Secretarial interpretation of 25 U.S.C. § 1302(8), be an acceptable appeal procedure for tribal court purposes, it does not merit consideration as a substantial basis for requiring appellate exhaustion. Finally, and most important, the tribal court judges have, through the District Court and Court of Appeals proceedings below, argued that their court *did* have jurisdiction over the School District. There is, therefore, no reasonable question that exhaustion of tribal court remedies would unnecessarily burden the petitioners with further delay and costs.[3] Application of the exhaustion doctrine is manifestly unwarranted under these facts.

III. The Crow Respondents' Claim Of Sovereign Immunity Is Both Analytically Flawed And Irrelevant.

The Crow respondents argue that the sovereign immunity doctrine requires their dismissal from this matter. (Crow Br. 7-13.) Although recognizing that Sage and Not

[3]The Crow respondents state in their brief at 13 n.6 that, "[s]ince the Crow Tribal Court and its judges have not been afforded the opportunity to address or rule on [the jurisdiction issue], the arguments presented [as to such issue] do not necessarily state the position of the tribal court or its judges." However, such judicial neutrality was, as stated in the text, not manifested before the District Court or the Court of Appeals where the tribal court respondents, in concert with the other Crow respondents, vigorously asserted their court's jurisdiction over petitioner School District.

Afraid would, even with such dismissal, be appropriate party defendants,[4] they suggest remand is necessary for determination of whether this action should be dismissed under Fed. R. Civ. P. 19(b). (*Id.* at 12.) Nonetheless, their position ignores (1) the interrelated nature of their sovereign immunity and the question of whether the tribal court had jurisdiction over petitioner School District and (2) the clear viability of this action even without their presence as defendants.

While the Court has not sketched the full nature and scope of tribal sovereign immunity,[5] it clearly exists only to the extent that the challenged conduct falls within the scope of the tribe's sovereignty rights. Thus, "tribal immunity is not a bar to actions which allege conduct that is determined to be outside the scope of a tribe's sovereign powers . . . ." *Snow* v. *Quinalt Indian Nation*, 709 F.29 1319, 1321 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 2655 (1984). The existence of sovereign immunity in this case is, therefore, inextricably connected to the merits of the underlying tribal court jurisdictional issue. The Crow respondents seemingly recognize this general principle but argue that (1) the non-tribal court respondents have no connection to the dispute and (2) the tribal court respondents are excepted from the class of tribal officials against whom injunctive relief may lie. (Crow Br. 10-11.)

Even if the Crow respondents' argument concerning the non-tribal court defendants is accepted, the unavailability of injunctive relief against the tribal court defendants cannot

[4]*See Puyallup Tribe* v. *Washington Department of Game*, 433 U.S. 165, 171-72 (1977).

[5]*See generally Santa Clara Pueblo* v. *Martinez*, 436 U.S. at 58 ("Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers").

be. The Crow respondents' position is derived analogously from the principle that, as a general matter, a federal court may not enjoin an ongoing state court proceeding. *See Ex parte Young*, 209 U.S. 123, 163 (1907). That principle, which again flows from notions of federal and state court comity, is inapposite for those reasons stated above in connection with the exhaustion question. There exists no sound policy rationale upon which to accord tribal court officials any greater degree of immunity from federal court relief when their conduct exceeds the bounds of their tribe's sovereignty rights, will clearly not be rectified through further tribal court proceedings and may, as found by the District Court, result in execution of the tribal court judgment and irreparable harm.

Sustaining the Crow respondents' sovereign immunity defense, moreover, does not warrant failing to reach the tribal court jurisdiction issue. Neither Sage nor Not Afraid enjoys immunity from suit, and they can be, indeed have been, subject to injunctive relief by the District Court which requires, *inter alia*, return of seized computer equipment to petitioner School District. The Crow respondent's suggestion that remand is appropriate for a Rule 19(b) determination is thus a rhetorical attempt to avoid reaching the tribal court jurisdiction question; neither precedent nor reason supports the argument that they are, or may be, indispensable parties since, for purposes of enjoining enforcement of the judgment, the presence of Sage and Not Afraid is sufficient for complete and binding relief.[6]

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[6]The tribal court judgment is, of course, not self-executing; execution proceedings must instead be instituted by Not Afraid on Sage's behalf. The Crow respondents' interest in whether the judgment is enforced is consequently indirect. It must be emphasized that the validity of the Crow Tribal Code is not at issue.

IV. The Crow Tribe's Sovereignty Rights Do Not Extend To Assertion Of Tribal Court Jurisdiction Over Petitioner School District Under The Facts Herein.

A. *The Importance of Montana.*

The petitioners have relied extensively on *Montana* v. *United States*, 450 U.S. 544 (1981), before the lower courts and in its principal brief herein because, quite simply, they believe it directly controls the substantive issue of whether the tribal court properly asserted jurisdiction over petitioner School District. While the respondents and their supporting *amici curiae* trace at length the somewhat tortured path of modern Indian sovereignty analysis, they obscure two critical points: (1) *Montana* represents the Court's most comprehensive and, in view of the instant facts, relevant treatment of tribal sovereignty; and (2) *Montana* is fully consistent with earlier and later sovereignty decisions.

Despite the respondents' and several *amici curiae's* attempt to blur the distinction between the relationship of the United States to the several States and that of the federal government to Indian tribes, there can be no question that the sovereignty rights possessed by tribes are both limited and *sui generis*. In *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. at 208, the Court thus observed:

> Indian tribes do retain elements of "quasi-sovereign" authority after ceding their lands to the United States and announcing their dependence on the Federal Government . . . . But the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court of Appeals recognized Indian tribes are prohibited from exercising both those powers of autonomous

> states that are expressly terminated by Congress *and* those powers "*inconsistent with their status.*" . . . *[Emphasis in original.]*

As in Oliphant, which concluded that tribes do not have the retained authority to prosecute nonmembers for criminal offenses, analysis of a tribe's inherent sovereignty rights must be made principally with reference to

> the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them. . . .

Id. at 206. *Wheeler* v. *United States*, 435 U.S. 313 (1978), immediately used this analytical structure to determine that tribes do retain the power prosecute their own members and that such power is, therefore, not delegated to them from the United States. Most importantly for present purposes, however, *Wheeler* noted that, while "internal criminal laws" involving only members' interests are a proper manifestation of retained sovereignty, the tribes' dependent status is "necessarily inconsistent with their freedom independently to determine their external relations." 435 U.S. at 328.

Oliphant and *Wheeler* thus carefully differentiated between retained sovereignty rights as to regulation of members' conduct and the general lack of such authority as to nonmembers. While this dichotomy has exceptions,[7] the

[7] *Washington* v. *Confederation Tribes of Colville*, 447 U.S. 134 (1980) (upholding tribes' authority to tax on-reservation, consensual cigarette purchases by nonmembers); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (sustaining validity of tribal oil and gas tax on nonmember lessee of tribal lands).

Court has never sustained, on the basis of retained sovereignty, a tribe's right to order the conduct of nonmembers on fee lands within a reservation in the absence of such nonmembers' consent. The lack of such holding reflects not only the fundamental precept that "[i]n this Nation each sovereign governs only with the consent of the governed"[8] but also the bedrock proposition that, with certain highly restricted exceptions, tribal retained sovereignty has application only to regulation of members.

The importance of *Montana* lies in its recognition of this distinction and in articulation of those limited instances in which a tribe's retained sovereignty may extend to nonmember conduct: (1) Regulation attendant to "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements"; and (2) the exercise of "civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." 450 U.S. at 565-66. As developed below, not only have the respondents failed to justify application of the second exception, but they have also suggested no legitimate basis upon which to warrant modifying *Montana*.

B. *The Respondents' Arguments.*

1. Attempts to Distinguish Montana.

The Crow respondents suggest *Montana* is inapplicable because "it is predicated on the absence of a nexus between the conduct of non-Indians hunting and fishing on non-Indian owned lands within the reservation and any significant Indian interest." (Crow Br. 24.) They also contend that,

[8] *Nevada* v. *Hall*, 440 U.S. 410, 426 (1979).

because a large percentage of the students attending the Lodge Grass Elementary School are Crow members and because members constitute a majority of the petitioner School District's board, the School District is, "[o]n a spectrum with Indians on one end and non-Indians on the other, . . . somewhere in between, a hybrid, but closer to the Indian side." (*Id.* at 28-29.)

It must first be emphasized that Sage, while a Crow member, was present on school property at the time of his injury in his capacity as a Montana citizen and subject to Montana laws regulating the education of children. *See* § 20-5-108, MCA. Similarly, petitioner School District itself is duly constituted under and is admittedly subject to Montana law. *See* § 20-6-101(2), MCA. Members of the School District's board, whether Crow or nonmember, and the School District's employees, whether Crow or nonmember, are subject to Montana law when acting in their official capacities. The Crow respondents' suggestion, therefore, that tribal membership status has legal significance with respect to the law governing the School District's conduct or somehow metamorphoses the District into a tribal agency is palpably incorrect. Equally untenable is the related argument that, for purposes of distinguishing *Montana*, Crow members' interaction with the School District in their role as Montana citizens must be construed as establishing a *tribal* interest. Nonetheless, legal relationships, even on Indian reservations, must be viewed in context, and the context here is structured entirely under state law and largely without reference to, or consideration of, tribal membership status.[9]

[9]This case must be distinguished from *Ramah Navajo School Board* v. *Bureau of Revenue*, 458 U.S. 832 (1983), which found preempted New Mexico's attempt to impose a gross receipts tax on a non-Indian construction firm for work performed under a contract with a Navajo tribal school board. The Court concluded that the "detailed regulatory scheme governing the construction of autonomous Indian education facilities" was so comprehensive as to preclude the state tax. *Id.* at comprehensive regulation by the United States of petitioner School District's activities, and the respondents have alleged none.

The Crow respondents' argument also ignores *Montana's* recognition that the General Allotment Act of 1887, 24 Stat. 388, and later allotment statutes clearly anticipated assimilation of the Indian population into state governmental and societal structures. As the Court noted, "There is simply no suggestion in the legislative history [of the General Allotment Act] that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian lands was consistently equated with the dissolution of tribal affairs and jurisdiction." 450 U.S. at 559 n.9. Instantly, that policy is vividly portrayed by the common public education of Indian and non-Indian children in accordance with state law. If any inference can be drawn from this paradigmatic reflection of the allotment statutes' underlying objective, it is that state, not tribal, law should determine the nature and extent of any legal obligation owed by petitioner School District to its students in the absence of contrary congressional directives.

In sum, there is no reasoned basis to distinguish *Montana* because of Sage's tribal membership or because of tribal members' involvement in petitioner School District's operation. That relationship is grounded on those individuals' status as Montana citizens and is, in all material respects, governed by Montana law. The Crow Tribe, in contrast, lacks any sovereignty rights, retained or otherwise, with respect to the School District's operation. *See Rice* v. *Rehner*, 103 S. Ct. 3291, 3295 (1983).

2. Claimed Adverse Impact on Tribal Governmental Interests.

In various formulations, the respondents and their *amici curiae* argue that a refusal to sustain tribal jurisdiction "will adversely affect the tribe's self-governance rights." (Crow Br. 22-23; Sage Br. 40-41; U.S. Br. 13, 16-18; Assiniboine Br. 5-8.) They most commonly rely on *Williams* v. *Lee*, 358 U.S. 217 (1959), as support for the notion that the Crow tribal court should be deemed to have jurisdiction herein.

Williams is, of course, factually inapposite since it involved the question of whether a state court could assert jurisdiction over a nonmember Indian trader's claim against two members deriving from an on-reservation transaction. The Court held that, under those facts and absent the tribal members' consent to state court jurisdiction, the nonmember was required to proceed in tribal court. *Williams* is further inapposite because it did not directly or indirectly confront the question of whether a tribe's retained sovereignty encompasses civil jurisdiction over a nonconsenting nonmember where the disputed conduct occurs on fee lands and the underlying relationship between the member and nonmember is governed by state law. Indeed, the Navajo tribal court deferred to in *Williams* was a Court of Indian Offenses whose civil jurisdiction did not encompass a member's claim against a nonconsenting nonmember. 358 U.S. at 222; *see* 25 C.F.R. § 11.22 (1959).

Furthermore, the simple fact that Sage is a tribal member does not mean that his inability to redress the alleged wrong in tribal court affects the tribe's economic security or health and welfare in any legally cognizable manner. First, *Montana* was careful to refer to "the health and welfare of the *tribe*" and thus clearly contemplated regulation of conduct constituting something more than an occasional injury to a single member. Second, the legal interest of the tribe in

regulating the relationship between petitioner School District and Sage is, as stated above, greatly attenuated by the state law-based nature of the relationship. Third, Sage had an adequate and readily accessible forum under Montana law in which to litigate the School District's allegedly tortious conduct. *See Three Affiliated Tribes* v. *Wold Engineering*, 104 S. Ct. 2267, 2274 n.7 (1984). The real tribal interest, after all, lies principally in the purported wrong to a member being capable of redress and not in using such wrong as an opportunity to expand the tribe's supposed authority. The relationship between Sage's injury and any substantial governmental interest of the tribe is thus so tenuous as to be nonexistent.

3. Sovereign Immunity Considerations.

The respondents and their *amici curiae* uniformly challenge the relevance of sovereign immunity considerations in this matter. (Crow Br. 30-31; Sage Br. 43-47; U.S. Br. 10-12; Assiniboine Br. 18-19.) Their analysis, however, misses the mark because the importance of sovereign immunity presently is not as a defense to the underlying tort claim but to whether Congress ever intended tribes to exercise civil jurisdiction over state political subdivisions.

There is no dispute that, until very recently, state political subdivisions were immune from suit in their own courts for tortious conduct attendant to the exercise of governmental functions. *See generally* T. Cooley, *Law of Torts* §§ 72, 388 (4th ed. 1932); F. Harper & F. James, *Law of Torts* §§ 29.4-29.6 (1956). Montana, like many other states, has eased the common law rule and now, within certain limits, permits actions to be maintained against it and its political subdivisions in state courts. *See* §§ 2-9-301 to 2-9-318, MCA. It is anomalous, however, to argue that Congress, at the time the various allotment statutes were enacted, con-

templated state political subdivisions could be subjected to the nonconsensual civil jurisdiction of tribal courts for conduct on fee lands but not subjected to such jurisdiction within their own courts. Petitioner School District's traditional sovereign immunity, while not dispositive of the tribal court jurisdiction issue, does constitute persuasive support for the conclusion that Congress never intended matters like Sage's injury and the School District's alleged culpability therefor to be resolved through tribal court action. The fact that Montana policy has changed concerning immunity should not, of course, affect the scope of *retained* tribal authority which, by its nature, is independent of state law.

4. Executive Branch Recognition of Tribal Court Civil Jurisdiction over Nonmembers.

Amici curiae United States and Assiniboine refer to the recent proliferation of tribal court civil jurisdiction over nonmembers as evidence of retained sovereignty in such matters. (U.S. Br. 16-18; Assiniboine Br. 25-28.) They also point to 7 Op. Att'y Gen. 174 (1855) as early Executive Branch recognition of tribal court jurisdiction over nonmembers. (U.S. Br. 14-15; Assiniboine Br. 10.) They have not, however, cited any modern authority remotely relevant to Executive Branch approval of tribal court jurisdiction under the facts herein.

7 Op. Att'y Gen. 174 is, inapposite. It dealt with a non-Indian married to a tribal member, living within the Chickasaw and Choctaw Reservation which was then not in any state, and exercising all rights of a Chickasaw member in the Choctaw and Chickasaw union. Irrespective of his possibly coexisting status as a United States citizen, he had clearly consented to regulation by the Choctaw courts. Neither the United States nor the Assiniboine, moreover, addresses the stark and undisputed fact that Courts of Indian Offenses, including that previously established for

the Crow Tribe, have never exercised civil jurisdiction over non-Indians without their consent. *See* 25 C.F.R. §§ 11.22, 11.22C (1984). Quite obviously, therefore, nothing in express Executive Branch policies with respect to the retained sovereignty rights of tribes in such matters supports the respondents' position.

The mere fact that, as the United States asserts, "no less than 66 Tribes expressly assert civil jurisdiction over non-Indians in some circumstances" is, aside from its singularly indefinite phrasing, of little moment. That 33 tribal codes purported to extend criminal jurisdiction to nonmembers did not prevent the Court in *Oliphant*, 435 U.S. at 196-97, from finding such claimed jurisdiction improper. Consequently, the "relatively new phenomenon" of tribal courts asserting claimed jurisdiction over nonconsenting nonmembers, even if such jurisdiction is deemed *arguendo* to be plenary and outside the limited instances covered by *Montana's* second exception, does not assist the respondents' position.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be reversed and Judge Battin's judgment should be upheld given his careful analysis of the undisputed facts in this unique case.

Respectfully submitted,

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April, 1985.

Office - Supreme Court, U.S.
FILED
APR 11 1985
ALEXANDER L. STEVAS
CLERK

No. 84-320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES; and LODGE GRASS SCHOOL DISTRICT NO. 27,
Petitioners,

v.

CROW TRIBE OF INDIANS; LEROY SAGE, a minor; FLORA NOT AFRAID, his guardian; THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; EDDIE ROUNDFACE, GLEN BIRDINGROUND, and IRA LEFT HAND, Judges of the Tribal Court of the Crow Indian Reservation; CROW INDIAN TRIBAL COUNCIL; and DONALD STUART, Chairman of the Crow Indian Tribal Council,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for The Ninth Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS

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TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
ARGUMENT	1
I. Respondents Have Seized School District Property Disrupting the Educational Process and Refuse to Return the Same Despite Being so Ordered by the Federal District Court	1
II. Sage Has a State Court Remedy	6
CONCLUSION	7

PRELIMINARY STATEMENT

The respondents and the several *amici curiae* urging affirmance of the decision uttered by the Ninth Circuit Court of Appeals have seemingly emphasized that petitioners' case is abstract and not ripe for decision because of the exhaustion issue. When discussing this position, it has been suggested by respondents Sage and Not Afraid that the Tribal Court "is prepared to afford every proper remedy and right due National, if it would appear before that court." (Sage Br. 49). Moreover, Sage has argued all along that he would be precluded from any remedy in the Courts of Montana were Judge Battin's decision ultimately sustained.

Following Justice Rehnquist's initial stay of the Ninth Circuit's Writ of Mandate and the granting of certiorari by this Court, several additional proceedings have taken place before the Federal District Court and the Ninth Circuit Court of Appeals. As those proceedings have become a portion of the record of this case and bear upon respondents' position above articulated, this Supplemental Brief is required. To aid this Court in the examination of the record as it has developed, petitioners have sent additional material which has been included in the records of the Federal District Court and Ninth Circuit Court of Appeal and requested the Clerk to lodge the same with the Court.

What follows is petitioners' attempt to show that this is not an abstract case in which no harm has yet befallen Lodge Grass School District No. 27 and an attempt to show that Sage through his counsel has erased the fiction that Sage was precluded from a State Court remedy in this case.

ARGUMENT

I. Respondents Have Seized School District Property Disrupting the Educational Process and Refuse to Return the Same Despite Being So Ordered by the Federal District Court.

On September 10, 1984, Justice Rehnquist extended his Order of August 23, 1984 which recalled the Ninth Circuit

mandate at issue herein and further stayed its reissuance until the ultimate resolution of the case by this Court.

During the process leading up to the September 10, 1984 Order, respondents had requested that this Court require a bond to be posted as a condition precedent to the continuing vitality of Justice Rehnquist's withdrawal and stay of reissuance of the Ninth Circuit's mandate. Justice Rehnquist, in response to this request, left the issue to be determined by Judge Battin.

On September 12, 1984, respondents Sage and Not Afraid moved Judge Battin to require the bond. (Supp. App."E".) This was two days after Judge James F. Battin reinstated the District Court injunction which ordered Sage and Not Afraid to refrain from executing on the original Crow Tribal Court Judgment. (Supp.App."E".)

On October 9, 1984, petitioners moved the Federal District Court to order a return of the school property seized by Mr. Belue and the Tribal Court even before the original injunction issued by Judge Battin had been rescinded in response to the Ninth Circuit's mandate. (Supp.App."F".) It is noteworthy that the Tribal defendants did not respond to this motion. They did not appear for argument on the motion and made no motion for bond themselves. In the meantime respondents Sage and Not Afraid withdrew their motion for a Federal District Court Order requiring bond. (Supp.App. p. 55, 1.17.)

On December 10, 1984, Judge Battin having read the briefs of Sage, Not Afraid and petitioners and having heard oral argument by their counsel, ruled that respondents "shall cause the school district property seized pursuant to a Crow Tribal Court writ issued on August 1, 1984, to be returned to the School District within (5) days of the date of this order." (Supp.App. Ex."G".) On December 11, 1984,

attorney Belue was made aware of the Order and stated to a newspaper reporter that he did not know what his next step would be, "but I'm not going to take that order without doing something." (Supp.App. Ex."J", p. 28, 1.10.)

Rather than appeal the December 10, 1984 Order to the Ninth Circuit Court of Appeals or to the United States Supreme Court, attorney Belue ignored the federal system and instead went to the Crow Tribal Court on December 18, 1985. (Supp.App. Ex."J", p. 58, 1.24.)

In his deposition, Mr. Belue testified that he visited with Tribal Court Judge Roundface on this date and was told by Judge Roundface:

> Clarence, why are you filing this motion? I was going to—I thought that they would come down here with Judge Battin's order, and I was going to ignore it. (Belue Depo. p. 72, 1.5.)

When petitioners noticed that the School District property had not been returned in obedience to Judge Battin's December 10, 1984 Order, they brought contempt proceedings against respondents to achieve return of the property. This was because the loss of the computers had destroyed what had previously been a nationally leading bilingual language program. (Supp.App. Ex."L", p. 41, 1.13.)

When respondent Tribal members were served with the motion to hold them in contempt, one of their counsel, Barbara Lavender, contacted petitioners' attorneys about settlement of the contempt proceedings relative to the Tribal respondents. Ms. Lavender proposed that she would make known Judge Roundface's position that but for Mr. Belue's Tribal Court motion of December 18, 1985, the Tribal Court had always been willing to return the property without bond. (Supp.App. Ex."I", p. 23, 1.17.) Thus peti-

tioners were induced to withdraw the contempt proceedings against the Tribal defendants. As is made clear in (Supp.App. Ex. "I"), Ms. Lavender although testifying she had full authority to make the foregoing representation, reneged on the deal. Faced with this development, petitioners were forced to request a continuance to properly prepare the contempt proceedings. That hearing was then set for March 7, 1985. Mr. Belue also charged the undersigned as well as two other attorneys with attempting to bribe Judge Roundface by agreeing to withdraw the contempt charges against him. These matters were also set for hearing on March 7, 1985. The transcript of that hearing is set forth as Exhibit "L" in the Supplementary Appendix. What was said therein goes to the core of petitioners' claims that the Crow Tribal Court has exerted unauthorized control over petitioners' property and continues to unlawfully exert jurisdiction over the property despite contrary orders issued by this Court and the Federal District Court.

The March 7, 1985 transcript makes it clear what the source of the problem is. At page 30, line 7, attorney Belue states, "We consider the actions of Judge Battin to be contemptuous. We consider that he has no jurisdiction." This was stated as the position of respondents in reaction to petitioners' claims that Justice Rehnquist, in ordering a withdrawal of the Ninth Circuit mandate and in requesting Judge Battin to address the issue of the seized property, had operated to require a return to the status quo prior to the seizure of the property.

Respondents have taken the position that Judge Battin's Order of December 10, 1985 in response to Justice Rehnquist's opinion of September 10, 1984 is an act of contempt vis' a vis' the Tribal Court's jurisdiction. Respondents also take the position that, "the Supreme Court did not have supervisory jurisdiction over the Crow Tribal Court." (Tribal Court's Memorandum dated April 2, 1985 to Ninth Circuit, p. 17.)

Finally petitioners and indeed the Federal District Court have been informed time and again that respondents will refuse to honor Federal Court activity in this case because as Mr. Belue has stated, respondents believe, "that Judge Battin and his country-club group and these attorneys are in sordid conspiracy, and I believe that, and I think that the evidence is here to support all of that." (Supp. App. Ex. "L", p. 209, 1.20.)

The results of the March 7, 1985 hearing were twofold. Mr. Belue was cited by the Court for contempt and secondly, Judge Hatfield found absolutely no merit to the disciplinary charges brought by Mr. Belue. Mr. Belue was given until March 13, 1985 within which to purge himself of the contempt.

So that this Court will be aware of the posture of this case below, all documents which have been generated in the Federal District Court file and the Ninth Circuit file have been lodged with the Court. The Ninth Circuit has stayed the contempt portion of Judge Hatfield's oral ruling of March 7, 1985 and has also stayed his issuing a written opinion dismissing the ethical charges brought by Mr. Belue.

The obtaining of the stay and other documents filed in connection with the contempt citation illustrate that despite the representations made by the attorneys for Tribal respondents, Judge Roundface has never entertained any thought of obeying Judge Battin's December 10, 1985 Order. He has entered an Order which basically contends that the Tribal Court is at war with the Federal District Court and that as a result thereof, this case may result in bodily harm to persons litigating the issues.

II. Sage Has a State Court Remedy.

Finally, it was discovered that respondents Sage and Not Afraid had filed a tort action involving the identical facts at issue in the Tribal Court judgment in State Court. (Affidavit of March 12, 1985, re: return of property.) When petitioners discovered this, they filed an answer and were prepared at long last to defend Mr. Sage's claims on the merits. At Sage's request, however, the State District Court has dismissed that action over petitioners' objection. Nevertheless, the filing of the action itself indicates that Mr. Sage is not without a forum in State Court despite the consistent protestations to the contrary.

CONCLUSION

Petitioners do not stand before this Court debating abstract issues. The assertion of jurisdiction over a political subdivision of the State of Montana has resulted in the seizure of School District property. The seizure has severely handicapped the District's duty to provide bilinqual education on the Crow Indian Reservation. Given respondents' avowed determination to ignore a valid Federal District Court Order to return the property, petitioner School District exists with the dread that future seizures of property could occur at any moment.

By filing a tort action in State District Court, respondent Sage has admitted that he has the right to have his case heard on the merits therein. Upholding Judge Battin's decision in this case will not deprive Leroy Sage of a right to his day in Court.

Respectfully submitted,

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April, 1985.